

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA

BETTY ANN MARSEE,  
Administratrix of the Estate  
of MARVIN SEAN MARSEE,  
Deceased,

Plaintiff,

vs.

UNITED STATES TOBACCO CO.,  
a New Jersey corporation,

Defendant.

No. Civ-84-2777R

TRANSCRIPT OF JURY TRIAL PROCEEDINGS  
Thursday June 19, 1986

A p p e a r a n c e s:

HON. DAVID L. RUSSELL,  
U.S. District Judge, Presiding

GEORGE W. BRALY, Esquire  
DANIA DESCHAMPS-BRALY, Esquire  
Braly & Braly  
217 North Mississippi  
Ada, Oklahoma 74820  
Appeared for Plaintiff.

TIMOTHY M. FINNEGAN, Esquire  
Jacob, Medinger & Finnegan  
1270 Avenue of the Americas  
Rockefeller Center  
New York, N.Y. 10020

and  
ALSTON JENNINGS, Esquire  
Wright, Lindsay & Jennings  
2200 Worthen Bank Building  
Little Rock, Arkansas 72201  
and

ANDY COATS, Esquire  
Crowe & Dunlevy  
1800 Mid-America Tower  
Oklahoma City, OK 73102  
Appeared for Defendant.

Volume 35

Maynard E. Peterson, CSR  
Acting Official Reporter

BE IT REMEMBERED, that on the 19th day of June, 1986, the above matter coming on for jury trial before the Honorable David L. Russell, United States District Judge for the Western District of Oklahoma, and the parties appearing in person and or by counsel as hereinabove set forth, the following proceedings were had:

MORNING SESSION

Thursday, June 19, 1986.

THE COURT: Good morning, ladies and gentlemen. As is obvious, we changed courtrooms to accommodate the group of people that wish to see the closing arguments.

Let me describe to you what will be happening this morning. As I believe we notified you yesterday, both the plaintiff and defendant have rested their case and you have heard all of the evidence. It now becomes the time for the closing arguments.

The plaintiff makes the first argument in

1 closing. The defense then gets an opportunity to  
2 make their argument, and the plaintiff then gets an  
3 opportunity for rebuttal. I have given each side a  
4 total of an hour-and-a-half to make their arguments.  
5 We will plan on taking, after plaintiff makes its  
6 opening argument, we will take a short recess at that  
7 time, then another recess at the conclusion of the  
8 defendant's argument. So I anticipate completing all  
9 the arguments before lunch.

10 Mrs. Braly, will you make the opening  
11 statement for the --

12 MS. DESCHAMPS-BRALY: Yes, Your Honor, and  
13 if you would be so inclined, I would like to inform  
14 the jury that we are going to split it between my  
15 husband and myself, since we have tried the case  
16 together, the opening and closing.

17 THE COURT: That's fine. Mrs. Braly will  
18 make the opening argument on behalf of the  
19 plaintiff. Mrs. Braly.

20 MS. DESCHAMPS-BRALY: Good morning. May it  
21 please the Court, ladies and gentlemen of the jury.  
22 Sean Marsee died over two years ago, tragically,  
23 pitifully, the worst way to die, according to Doctor  
24 Kent Westbrook. When my husband and I decided to  
25 take this case almost two years ago, the case that

1 has brought us to this courthouse, we decided then  
2 that we would prove to you on the evidence that  
3 Copenhagen Snuff killed Sean Marsee and if we would  
4 not prove it to you on the evidence, then not at all.

5 Sean is entitled to justice in this  
6 courtroom, and that is what his mother asks of you.  
7 You are to decide the case on the evidence you have  
8 heard. Judge Russell will instruct you that that is  
9 your only duty.

10 Some of the evidence is not disputed, even  
11 by U.S. Tobacco. It is not disputed that Sean Marsee  
12 died of mouth cancer. It is not disputed that his  
13 mouth cancer arose on the tongue, on the same side on  
14 which he kept his quid of tobacco.

15 It is not disputed that Sean Marsee was a  
16 loyal and faithful user of Copenhagen Snuff for  
17 approximately six years of his short life.

18 It is not disputed that Copenhagen Snuff  
19 contains nitrosamines. It is not disputed that out  
20 of all the snuff tested by the American Health  
21 Foundation, Copenhagen Snuff contained the highest  
22 levels of what you have come to know as NNN and NNK.  
23 It is not disputed that Copenhagen contains another  
24 nitrosamine known as nitrosomorpholine.

25 It is not disputed that during his six years

1 of snuff-dipping, Sean Marsee put more nitrosamines  
2 into his mouth than he could possibly have consumed  
3 by eating any other consumer product on the market.

4 It is not disputed that U.S. Tobacco has  
5 even admitted that its highest executives knew that  
6 there had been for many years, at least, a scientific  
7 controversy over whether snuff could cause cancer and  
8 other oral diseases. You heard Mr. Bantle tell you  
9 that. You heard Per Erik Lindqvist tell you that,  
10 and you heard Doctor Richard Manning tell you that  
11 when we could get him to tell you anything at all.

12 What is it that Manning had to hide? What  
13 is it that Manning would not tell you? It is not  
14 disputed that U.S. Tobacco has known that their snuff  
15 contained nitrosamines since 1974. That's 12 years  
16 ago.

17 It is not disputed that the amount of  
18 nitrosamines that Sean Marsee put in his mouth using  
19 the defendant's product was more than sufficient to  
20 have caused cancer many times over if the equivalent  
21 had been applied to the mouth in a laboratory  
22 animal. It is not disputed that at no time did U.S.  
23 Tobacco ever put warnings on the Copenhagen Snuff  
24 Sean Marsee bought and used here in America, although  
25 it was putting warnings on their products in Sweden.

1           It is not disputed that Sean Marsee thought  
2   that snuff was safe. Sean many times told his family  
3   that snuff was safe. It had to be. It didn't have  
4   any warning labels on it. And surely if it wasn't  
5   safe, those professional athletes that he admired and  
6   that he looked up to would not be out there promoting  
7   a product that wasn't safe.

8           You see, U.S. Tobacco had a huge conflict of  
9   interest. On the one hand, they had a moral and a  
10   legal duty to advise their consumers that their  
11   product could possibly be dangerous, that it had  
12   dangerous ingredients in it. On the other hand, they  
13   wanted to protect the profits that they made each  
14   year from not putting those warning labels on.

15           And when the Bantles and the Mannings and  
16   the Lindqvists sat around the board room table to  
17   make the decision as to whose interest is sacrificed,  
18   they sacrificed the interest of the consumer, of the  
19   unsophisticated and trusting Sean Marsees of this  
20   nation, coldly and callously. They knew precisely  
21   what they were doing.

22           To play with anyone's life for the sake of  
23   profits is appalling and unforgivable. To play with  
24   the life of a child is an unforgivable abomination.

25           Sean Marsee had no way of knowing that the

1 four-and-a-half cans of Copenhagen Snuff that he was  
2 consuming approximately each week were causing the  
3 cells in his mouth to turn into voracious monsters  
4 that would consume his handsome youth, his vigor, his  
5 athletic abilities, and finally when he had nothing  
6 else left, his weary mutilated body.

7 I do not believe that defense counsel will  
8 stand before you and tell you that Copenhagen Snuff  
9 does not cause cancer. I believe instead that they  
10 will say, "It has not been scientifically established  
11 that snuff causes any human disease, including tongue  
12 cancer."

13 We say if the U.S. Tobacco Company even had  
14 a remote knowledge of the possibility that it could  
15 cause harm to humans, then it should have warned.

16 What is in dispute is this. Do nitrosamines  
17 cause cancer in animals, in mammals, mice, hamsters,  
18 other orders of animals?

19 Doctor Hoffmann said they do. Doctor Steve  
20 Hecht said they do. Doctor William Lijinsky said  
21 they do. Those experts who have devoted their lives  
22 to studying these questions have said that every  
23 single one of 40 species of animals that have been  
24 tested with nitrosamines have developed cancer. The  
25 Surgeon General of the United States says they do.

1 The International Agency for Research on Cancer says  
2 they do. U.S. Tobacco says it has not been  
3 scientifically established.

4 The second question. Are nitrosamines  
5 dangerous to humans? Doctor Dietrich Hoffmann says  
6 they are. Doctor Hecht says they are. Doctor  
7 Lijinsky says they are. Doctor Rohrer, defendant's  
8 own witness, in his article that was read to you in  
9 this courtroom says they are. The Surgeon General of  
10 the United States says they are. The International  
11 Agency for Research on Cancer, which you have now  
12 come to know as IARC, says they are. U.S. Tobacco  
13 says it has not been scientifically established.

14 The third question. Have studies of large  
15 human populations shown that people who use snuff are  
16 more likely to develop mouth cancer than people who  
17 do not? Doctor Carl Hook, who diagnosed and treated  
18 Sean, said they have a greater likelihood of  
19 developing cancer. Doctor Lester Breslow said they  
20 have a greater likelihood of developing cancer.  
21 Doctor Westbrook said they have a greater likelihood  
22 of developing cancer. Doctor Prakash Gupta from  
23 Bombay, India, trained at Johns Hopkins, said they  
24 have a greater likelihood of developing cancer. The  
25 Surgeon General of the United States says they have a



1 greater likelihood of developing cancer. The  
2 International Agency for Research on Cancer says they  
3 have a greater likelihood of developing cancer.

4 And clinical doctors, such as Doctor Kent  
5 Westbrook, and studies that we have read to you by  
6 other doctors practicing medicine and seeing these  
7 poor victims as far back as 1915 have said that they  
8 have a greater likelihood of developing cancer. The  
9 occurrence is so frequent, in fact, that they have  
10 given a name to such cancers. They have branded them  
11 as "snuff dipper's cancer." U.S. Tobacco says it has  
12 not been scientifically established.

13 A famous man of science once said, "All the  
14 writing on the wall of science is invisible to those  
15 who most need to read it."

16 For weeks now you have heard defense counsel  
17 cross-examine our witnesses and stress over and over  
18 that all we have shown is a statistical association  
19 between the use of snuff and oral cancer. Their  
20 experts have said that it has not even been  
21 scientifically established that smoking is a cause of  
22 lung cancer. So says U.S. Tobacco. You cannot prove  
23 causation in Sean Marsee or in anybody else. They  
24 know full well that by their definition, proof of  
25 causation is philosophically and practically

1 impossible in this world.

2 By their definition scientists could not  
3 prove that the sun will rise tomorrow, but you and I  
4 with experience and common sense still make plans  
5 each night to get up the next morning, get dressed  
6 and go to work.

7 Only an unethical scientist would perform  
8 experiments on humans. Such a scientist could select  
9 identical twins for his experiments. He would make  
10 sure that they had the same diets, the same  
11 toothpaste, the same deodorant, the same exercise,  
12 the same everything. Then he could have one out of  
13 each of those set of twins use snuff, the other would  
14 not.

15 The first, the users of the snuff, would be  
16 his laboratory test subjects. The remaining twins  
17 would be the control group. If every experimental  
18 twin developed oral cancer, we would have the type of  
19 proof that U.S. Tobacco would finally admit has  
20 established causation, but that experiment will not  
21 be done because ethics and our sense of humanity  
22 makes us shudder at the thought of human guinea  
23 pigs. U.S. Tobacco does not approve of human  
24 experimentation. Of course, not. No one does. And  
25 so scientists work with animals.

1 But you cannot make assumptions from animals  
2 to mankind, says U.S. Tobacco, and statistics don't  
3 prove anything U.S. Tobacco tells us, although they  
4 spent millions and millions of dollars each year  
5 based on statistics for their advertising to  
6 determine who is going to buy their product and what  
7 is the best way to sell it.

8 What the doctors in their practice see as  
9 they treat patients is not proof, since it isn't a  
10 controlled scientific study, says U.S. Tobacco. And  
11 so you see, Mrs. Marsee, you cannot prove causation.

12 Members of the jury, let us suppose for a  
13 moment that this was a criminal case and lying dead  
14 on the floor is a man with a bullet hole in his  
15 heart. Standing over him is another man holding a  
16 smoking pistol. There are many other people who  
17 could have killed that victim. The attorney might  
18 come in and say, "Well, it's even possible that the  
19 victim killed himself, but, ladies and gentlemen of  
20 the jury, using your common sense and your  
21 experience, I doubt that even Mr. Jennings could  
22 convince you that anyone else besides the man  
23 standing over the victim that was holding that  
24 smoking pistol was the one who killed the man on the  
25 floor.

1           That is, however, what they are asking you  
2 to believe here, that something else, they don't know  
3 what, but something else besides the snuff that Sean  
4 kept between his cheek and his gum was what caused  
5 that cancer. They don't know, something, but not  
6 their product.

7           And what is their alibi, so to speak? Why  
8 do they think that you should believe this? This is  
9 the way it goes. Cancer of the tongue in the young  
10 is rare. So says U.S. Tobacco, there is no way to  
11 establish that the snuff that Sean used was anything  
12 more than a coincidence. In some of the literature  
13 the authors say they can't find any apparent reason  
14 for tongue cancer in young people. He might have  
15 gotten the cancer even if he had never used a can of  
16 snuff.

17           The fact that he did use snuff, that he kept  
18 it right opposite where he got the tongue lesion and  
19 the earlier leukoplakia in the same area proves  
20 nothing, says U.S. Tobacco. If you will remember  
21 back to those articles that Mr. Jennings kept  
22 bringing up, you will recall that one young person  
23 had pipetted carcinogenic chemicals. That's when  
24 they have those little glass kind of straws that they  
25 use. The author in that article did not decide that

1 that young person's tongue cancer was mysterious and  
2 unknowable. He had an apparent reason staring him in  
3 the face.

4 In another article one young boy received  
5 radiation to the head years before. The author of  
6 that article didn't pick the mysterious over the  
7 obvious. Doctor Kent Westbrook, I think, said it  
8 best. If a young person drops dead suddenly, which  
9 happens rarely, but it does happen, you suspect that  
10 for some unknown reason there was cardiac  
11 arrhythmia. But if you see that same young person  
12 running across a field and you see him struck by a  
13 bolt of lightning and he drops dead, you don't look  
14 for the unknown cause of some arrhythmia. You have  
15 that cause staring you in the face.

16 We have never, not one of our experts, has  
17 ever tried to tell you that everyone who develops  
18 oral cancer uses tobacco nor that everyone who uses  
19 tobacco gets oral cancer. What we have brought  
20 before you, I submit, is overwhelming evidence by the  
21 leading scientists and researchers in this world that  
22 most oral cancers are associated with the use of  
23 tobacco. That rarely do head and neck surgeons see  
24 oral cancer in nontobacco users, and that if you use  
25 snuff, your chances of getting oral cancer are

1 greatly increased.

2 You have heard experts tell you that the  
3 area most frequently affected is the buccal groove  
4 between the cheek and the gum, but that when one uses  
5 smokeless tobacco, the entire oral cavity is at risk.

6 I submit to you, ladies and gentlemen, that  
7 if you see a young man with cancer of the mouth after  
8 consuming 16 milligrams of nitrosamines for every two  
9 pounds of his body weight for the last six years of  
10 his life, I submit you do not have to look for  
11 mysterious, occult causes. It's right there between  
12 his cheek and his gum.

13 They speak about the rarity, but remember  
14 what you heard, ladies and gentlemen, before the  
15 cigarette companies began to promote their product,  
16 lung cancer was never talked about. It was a rare  
17 disease. Now, we have a nation of smokers and lung  
18 cancer has moved to the top of the list of cancer  
19 killers.

20 I suggest to you that if U.S. Tobacco had  
21 not enticed Sean Marsee to become addicted to their  
22 Copenhagen product, if from a time long before he was  
23 old enough to shave he had not had an overwhelming  
24 physical need to obtain a nicotine kick and to  
25 maintain a nicotine level around the clock that would

1 keep him from feeling bad, Sean Marsee would be in  
2 the army today, serving his country, and perhaps  
3 running on an army track team somewhere. I think it  
4 is as simple as that.

5 When we have finished, what is called final  
6 argument, I believe Judge Russell will instruct you  
7 that we on behalf of Mrs. Marsee, as it should be,  
8 bear the burden of proof in this case. That burden  
9 of proof, ladies and gentlemen, is not beyond a  
10 reasonable doubt, it is not to a scientific  
11 certainty. Our burden of proof in this civil case is  
12 what we call a preponderance of the evidence.

13 I want to talk to you for a minute about  
14 that standard, about the preponderance of the  
15 evidence.

16 Preponderance of the evidence simply means  
17 that you must be persuaded that the case we have  
18 presented to you is more probably true than not  
19 true. You must decide that it is more probably true  
20 than not true that Copenhagen Snuff is unreasonably  
21 dangerous and you must decide it is more probably  
22 true than not true that Copenhagen Snuff was a direct  
23 cause of the cancer that killed Sean Marsee.

24 The Judge, I believe, will also instruct you  
25 that the Copenhagen Snuff must be a direct cause of

1 Sean's cancer, but it need not be the only cause. If  
2 Copenhagen snuff is a direct cause, then U.S. Tobacco  
3 is responsible, even though there may be other causes  
4 in existence.

5 Now, returning to preponderance of the  
6 evidence. Another way to state it is to refer to the  
7 analogy of the scales of justice. When we began this  
8 trial, the scale was evenly balanced. That is why  
9 Judge Russell took so much time and gave so much  
10 effort in selecting the jury, because when this trial  
11 started, he wanted to make sure that none of you had  
12 any particular feelings, one way or the other, either  
13 in favor of Mrs. Marsee or of U.S. Tobacco.

14 All of the evidence that we have presented  
15 to you, both by spoken testimony and by all of the  
16 exhibits that have been admitted into evidence, you  
17 put on our side of the scale. After you have  
18 reviewed all of that evidence, then you must  
19 determine whether we have tilted that scale just even  
20 so slightly. When you have reviewed all of the  
21 evidence submitted by both plaintiff and defendant,  
22 if you find that that scale is still tilted even  
23 slightly in our favor, or more, then Judge Russell, I  
24 am confident, will instruct you that it becomes your  
25 duty to find in favor of Mrs. Marsee and against U.S.



1 Tobacco.

2 I might also mention to you at this time  
3 that you are entitled to have with you in the jury  
4 room for your use all of the charts and graphs and  
5 studies that have been admitted into evidence. They  
6 will not be automatically sent to you, but if you  
7 ask, Judge Russell will see that they are provided  
8 for your use.

9 Now, let me move on to another area. If we  
10 have persuaded you that snuff more likely than not  
11 causes cancer and that Copenhagen Snuff was more  
12 likely than not what caused Sean Marsee's cancer,  
13 this is the time to talk about damages. We are  
14 asking for three kinds of damages. Judge Russell, I  
15 believe, will instruct you that if the facts so  
16 warrant you may award all three.

17 When this case started, we were asking for a  
18 fourth type of damage, that was what Sean would have  
19 contributed to his mother's support for the rest of  
20 his life from his future earnings. However, compared  
21 to the other damages in this case, it did not seem  
22 fair or important to burden you, the Court, or the  
23 record, and we have dropped that claim.

24 So the first type of damage is to repay Mrs.  
25 Marsee for the medical, hospitalization and burial

1 expenses that she has incurred as a result of the  
2 illness and death of her son. The amount is  
3 \$58,529.83. U.S. Tobacco has not disputed that  
4 number.

5 The second amount is to compensate Sean,  
6 were he still here, for the pain and agony he  
7 suffered as a result of the cancer caused by the  
8 defendant's product. How do you measure pain and  
9 suffering? How can any amount of pain and suffering  
10 ever be turned into dollars. I think that is one of  
11 the most difficult tasks that a jury has to perform.  
12 All that you can do is to apply your own experience  
13 of pain and agony and horror to the evidence that you  
14 have heard in this case and draw your own  
15 conclusions.

16 You heard Doctor Westbrook testify, it is  
17 the worst way that he can think of to die. At the  
18 end, you can't breathe, you can't eat, you can't  
19 swallow, you can't drink. Do you remember John  
20 O'Dell telling you how much Sean wanted to drink a  
21 glass of juice and he would put the cup to his mouth  
22 and he would pretend it was going down, but it was  
23 coming out his nose because he could not swallow, the  
24 tumors were blocking the way.

25 You have to be fed through a tube in your

1 nose. You have to breathe through another tube in  
2 your neck, and you smell so bad that those people who  
3 love you most and want to make your last days as easy  
4 as possible are made nauseous by the smell of the  
5 dying, decaying flesh. You heard them tell you how  
6 they had to put deoderant bottles all around that  
7 trailer while Sean was asleep so he wouldn't know and  
8 so they could stand to be around him.

9 You are in constant pain and the narcotics  
10 that they give you serve only to dull that pain.  
11 They don't take it away. And so you become addicted  
12 to the narcotics to replace the addiction to nicotine  
13 that brought you to the miserable condition that you  
14 now find yourself in.

15 And, finally, at the end when all is taken  
16 from you, you come to look upon death as the final  
17 release, the blessing which your present misery makes  
18 welcome and which your religious faith tells you at  
19 last will bring you faith, will bring you comfort and  
20 will bring you release from pain.

21 Through it all, right to the last minute,  
22 the victim of that type of cancer is conscious and  
23 aware. He knows what is happening to him. He  
24 endures every moment, every agony, every pain, every  
25 indignity of not being able to do for himself, every

1 sense of what might have been. Sean knew that for  
2 him there would be no career, there would be no wife,  
3 no home, no children. There would be no  
4 grandchildren to gladden the heart of his mother who  
5 died with him a little bit each day.

6 Doctor Westbrook told you the oral cancer  
7 rarely affects the brain. It is conscious to the  
8 end, it is conscious to register the pain and the  
9 suffering. He knows everything that is happening to  
10 him. He knows he is dying. He knows there is no  
11 reprieve. He knows that the only release can be  
12 death.

13 You heard from Cheryl Strickland, the young  
14 lady who tried to help Sean cope with his pain. She  
15 told you that during the time that she has been  
16 working with pain patients, she has seen somewhere  
17 between 3- and 4,000 of those patients. And she told  
18 you that Sean never complained, that he was brave,  
19 and yet she also told you that of those three or four  
20 thousand, he was suffering with those in the top ten  
21 in the amount of pain that he was suffering yet, he  
22 never gave up. He was as willing to endure her  
23 exercises and accept her counseling.

24 I can do no more than remind you of these  
25 things. You, in the jury room, in the privacy of

1 your heart and with your fellow jurors must think  
2 about these things and turn them into dollars.  
3 Dollars that can never bring Sean Marsee back,  
4 dollars that cannot relieve one moment of his pain  
5 and suffering, but dollars which, nevertheless, the  
6 law entitles him to recover. Since he is gone, the  
7 law entitles his mother to recover for him just as  
8 though he had lived long enough to ask you for them  
9 himself. I suggest to you that \$5 million is an  
10 appropriate number, but yours is a difficult task of  
11 turning agony into dollars.

12 Sean is not the only one who has suffered.  
13 Betty Marsee suffered from the first day that she  
14 looked at her son's tongue and she knew something was  
15 wrong. She knew that that was not your average  
16 canker sore. And so she took Sean to the doctor and  
17 there was the first operation, and Doctor Hook told  
18 Betty. "Betty, if we are in the operating room more  
19 than one hour, you will know that Sean is in  
20 trouble." And the operation lasted much longer than  
21 one hour and Carl Hook came out to talk to Betty Ann  
22 Marsee, but he didn't have to tell her. She already  
23 knew, but she hoped. And sometimes hope makes  
24 suffering worse. She hoped that this operation would  
25 do it, that they had caught all of the cancer and

1 that her child would be able to live free of this  
2 horrible disease. But that was not the way it was  
3 supposed to be, because they found a lump in Sean's  
4 neck, and it was the cancer that had spread what we  
5 now in this courtroom all call metastases, and so  
6 there was another operation and she thought again  
7 maybe, just maybe this time it's it, they have really  
8 got it. And then Sean had radiation treatments five  
9 days a week for five weeks, and it made him ill. He  
10 would have to stop the car on the side of the road so  
11 he could throw up. His sister Marian who loved him  
12 couldn't stand it, she had to return to Tulsa because  
13 she couldn't watch her brother go through that. And  
14 when that was over, he was back in the hospital to be  
15 treated for the effects of the radiation treatment.  
16 But again Betty Ann Marsee hoped now everything will  
17 be all right. And it was for a couple of months, and  
18 the hope was there. But then it was dashed again,  
19 because there was another lump. And this time Sean  
20 was taken to a bigger hospital in Oklahoma City,  
21 because Valley View couldn't handle the type of  
22 procedure that he would need if surgery could be  
23 done. And it was a long operation, and when it was  
24 over and Betty Ann Marsee walked into the recovery  
25 room, do you remember what she saw? Her son elevated

1 in a bed with tubes coming out of every imaginable  
2 hole. He could not talk to her. He could just look  
3 at her and her thought was, he's saying to me,  
4 mother, I did not know it would be this bad. And yet  
5 Betty never let on to Sean that she didn't think he  
6 would be all right. She gave him all the moral  
7 support that she could, and she worked. She worked  
8 in her job, and she came home and she helped to take  
9 care of her son.

10 John O'Dell has told you about the love  
11 between this mother and this son, how she cleansed  
12 his trach, how she bathed him, how she took care of  
13 him. She would come home from work and while he was  
14 still able to walk take him to the bathroom, give him  
15 a bath so he wouldn't smell so bad, later on do it in  
16 bed. But would she then go to bed and sleep  
17 herself? No. Marian has told you she would sit in a  
18 chair in the living room of that trailer house by  
19 Sean's hospital bed and sit with him, watch  
20 television with him, and Marian would say, "Mother,  
21 go to bed, get some rest." And she said, "No, I'll  
22 be all right. I'll be all right." And she kept it  
23 up for Sean's sake.

24 And finally, blessedly, Sean died, and he  
25 died in his mother's arms not too long after

1 Christmas. And do you remember what that Christmas  
2 was like for Sean and for Betty? His sister Marian  
3 would not come home, not because she didn't love her  
4 brother, but because she couldn't bear to see him.  
5 Jason, who considered Sean to be his father, stayed  
6 away, he didn't come home until late on Christmas  
7 Eve. Betty bought presents for all the children. She  
8 couldn't think of what to buy for Sean, because she  
9 didn't want to admit it, because she new that was his  
10 last Christmas. And she said, "I bought him a pair  
11 of cowboy boots, but I could not wrap the boots  
12 because I thought that if I wrapped them, he would  
13 surely die."

14 That doesn't make logical sense, but at  
15 times like that people are not thinking logically.  
16 It's their bare emotions. But the time came when  
17 Sean in January had to go to the hospital and John  
18 O'Dell tells us that although Sean couldn't talk, he  
19 knew that the feeding tube was bothering Sean,  
20 hurting Sean. He couldn't tell what the problem was,  
21 but Sean pulled that feeding tube out of his nose,  
22 and then again he does not know why, perhaps  
23 realizing that that was his lifeline, Sean Marsee  
24 tried to put the feeding tube back in. He tried to  
25 jam it up his nose and he could not do it, and that



1 was the only time that John O'Dell ever saw him cry.

2 Betty Marsee came into the room and she  
3 helped and finally he died. It couldn't be done. A  
4 blessed relief for Sean, but not for his mother. She  
5 will live on with those memories perhaps it will dull  
6 with time as all things do, but any of you who are  
7 mothers or fathers know that the death of a child  
8 will never be forgotten and Betty will remember and  
9 grieve until the day she is at last with Sean.

10 No amount of money can undo her misery or  
11 her anguish, but you must put a dollar figure on it.  
12 You must do that, and I suggest to you that the  
13 proper amount for her suffering is \$5 million.

14 Finally, we come to what is known as  
15 punitive damages. You must decide how much money to  
16 take away from U.S. Tobacco in order to convince them  
17 that they were wrong, willfully, morally and evilly  
18 wrong. How much will it take to stop them from what  
19 the law calls a reckless disregard for the public  
20 safety? How much of a penalty will it take to make  
21 U.S. Tobacco and any other big corporation tempted to  
22 act the same way believe that we as a humane and just  
23 society simply are not going to tolerate anyone  
24 selling an addictive substance to adults and  
25 particularly to children knowing full well that there

1 is at least a scientific controversy over the safety  
2 of the product and choosing profits over a warning  
3 label. How much of a dollar penalty will it take to  
4 convince U.S. Tobacco that our society is not going  
5 to tolerate the promotion of a dangerous product to  
6 lure boys as young as 15 years of age to use an  
7 addictive product, suggesting that it's the cool  
8 thing to do and in the meanwhile implying that it is  
9 a safe alternative to cigarettes.

10 How much of a penalty will it take to  
11 convince U.S. Tobacco that our society is not going  
12 to tolerate a company warning Swedish mothers of the  
13 dangers of its products because of orders of the  
14 Swedish Health Department, but denying voluntary  
15 warnings to American mothers? How much of a penalty  
16 will it take to convince U.S. Tobacco that it is less  
17 expensive to make a safer product than it is to make  
18 a dangerous one? The amount, Mrs. Marsee asks you to  
19 assess for punitive damages in this case is a large  
20 number. It is an enormous number. It is not an  
21 unreasonable number.

22 We have shown evidence that this company has  
23 grown rich during the time that it has used Walt  
24 Garrison and Carlton Fisk, Bobby Mercer and all the  
25 other techniques of advertising seduction. They have

1 grown to be No. 476 on the Fortune 500 list, and by  
2 their scale most profitable of all the Fortune 500  
3 companies. In the year Sean Marsee's cancer was  
4 diagnosed, U.S. Tobacco made after all of its  
5 expenses, all of its overhead, paying all of its  
6 employees, it put into the bank \$136,540,000. Mrs.  
7 Marsee asks that you award that amount. Their annual  
8 profits before taxes for the year Sean became ill as  
9 punitive damages for their reckless disregard. It is  
10 an enormous number. What they did to Sean Marsee was  
11 an enormous evil. What they did to Betty Ann Marsee  
12 was an enormous evil. It can never be rectified.  
13 She will live with the knowledge of this evil for the  
14 remainder of her life. It is a fair number. It is a  
15 just number. It is a symbolic number, it is a number  
16 that satisfies our sense of justice. It does not  
17 take from U.S. Tobacco anything except the profits  
18 they made in the year Sean became ill. It does not  
19 put one man or one woman out of work. It does not  
20 put that company into bankruptcy. U.S. Tobacco will  
21 remain one of the richest companies of its size in  
22 the world.

23 The law does not allow this enormous sum of  
24 damages to enrich Mrs. Marsee, although it will. It  
25 is to punish, to set an example, and to prevent U.S.

1 Tobacco and others like them who might be tempted to  
2 profit by trading in human misery to think long and  
3 hard before they do. Never again should a company  
4 feel that it is better for them legally to wait and  
5 be forced to put warning labels on a dangerous  
6 product than to do so voluntarily.

7           You are the sole judges of this. Do you  
8 want this kind of behavior to continue? Do you think  
9 it is time to say to U.S. Tobacco no more, warn now,  
10 don't wait for the government to make you do it.  
11 Make your product safer, it may cost you some money,  
12 but it's feasible, and you out there looking in, take  
13 notice, don't act in the same way or the same thing  
14 may happen to you. If you do feel this way, punish  
15 them with a number big enough to get their  
16 attention. I submit to you that a proper amount is  
17 the profit they made in 1983. Any small number will  
18 bring a smile to their face, just as they have smiled  
19 throughout this entire trial.

20           Ladies and gentlemen, I submit to you that  
21 the writing on the wall of science was not invisible  
22 to U.S. Tobacco. They saw it. They read it and they  
23 deliberately chose to ignore it.

24           I ask you to find for Sean Marsee. In doing  
25 so, you will be finding for all those who might have

1 started using snuff without knowing the dangers. I  
2 ask you to find for Betty Ann Marsee. In doing so,  
3 you will be finding for all the mothers who might try  
4 to stop their sons from using snuff, but don't have  
5 the information and ammunition to do so. I ask you to  
6 return a total verdict for Sean and Betty Marsee in  
7 the amount of \$146,598,529.83.

8 There used to be a very famous judge whose  
9 name was Learned Hand, and he said, and on this I  
10 will finish. A corporation has no mind. It has no  
11 conscience, it has no heart, and it has no soul.  
12 Sean Marsee had a keen young mind, he had a clear  
13 conscience, he had a big heart, and, ladies and  
14 gentlemen, whatever your decision in this courthouse  
15 may his soul rest in peace.

16 THE COURT: Ladies and gentlemen, we will  
17 take a short recess at this time. We will recess for  
18 ten minutes. Nancy will come and get you in just a  
19 few minutes before ten minutes. And everyone remain  
20 seated while the jury exits. And while you are out,  
21 again, let me admonish you, don't let anyone discuss  
22 the case around you, don't discuss the case among  
23 yourselves, just take a recess and be back here in  
24 ten minutes. Everyone remain seated while the jury  
25 exits.

1           Remain seated while the jury exits.

2           (The following proceedings were had OUT OF THE  
3    PRESENCE AND HEARING OF THE JURY.)

4           THE COURT: Court will be in recess for ten  
5    minutes.

6           THE COURT: Ladies and gentlemen, Mr.  
7    Jennings will make the final argument on behalf of  
8    the defendant.

9           Mr. Jennings.

10          MR. JENNINGS: May it please the Court,  
11    ladies and gentlemen of the jury. I anticipate that  
12    the Court will tell you in his instructions that you  
13    are not to decide this case on the basis of emotions,  
14    on the basis of sympathy, on the basis of prejudice  
15    or bias. I assume that Mrs. Braly was aware of that  
16    when she prepared her remarks and when she delivered  
17    them. I think the Court will tell you further that a  
18    corporation is entitled to the same consideration by  
19    a jury as an individual is. I'm sure that Mrs. Braly  
20    was aware of that when she talked about the  
21    heartless, mindless, soulless corporation. I happen  
22    to think you will heed the Court's instructions. So  
23    for that reason I want to talk to you about the  
24    scientific evidence in this lawsuit.

25          I want to say to begin with that I suspect

1 that this is a day that some of you thought would  
2 never arrive. We are about to finish this lawsuit.  
3 I want to thank you sincerely for your patience, for  
4 your attention to the witnesses and to everything  
5 that has been presented in this lawsuit, and I thank  
6 you not only in my behalf, but also in behalf of Mr.  
7 Garrison and Mr. Coats and Mr. Finnegan, and we do  
8 sincerely appreciate it.

9 As Mrs. Braly has indicated, the Court is  
10 going to tell you, we think, in his instructions that  
11 one of the things that you have to determine is  
12 whether or not it has been established by a  
13 preponderance of the evidence that Sean Marsee's  
14 tongue cancer was caused by snuff.

15 The Court will tell you, I believe, that the  
16 plaintiff has the burden of proof. The plaintiff  
17 must present evidence that, when weighed against all  
18 the other evidence in the case, will satisfy you that  
19 Sean Marsee's tongue cancer was caused by Copenhagen  
20 Snuff. So I want to talk to you about the evidence  
21 on that subject.

22 We know, it is undisputed that everybody who  
23 uses snuff or any other tobacco product doesn't get  
24 cancer. In fact, we know that the overwhelming  
25 majority of people don't get cancer. Does that prove

1 that it doesn't cause cancer? Certainly not. Does  
2 it prove that it does cause cancer? Certainly not.  
3 We know something else that is undisputed. We know  
4 that people who have never used tobacco get cancer,  
5 including tongue cancer. Does that prove that  
6 tobacco doesn't cause cancer? It absolutely proves  
7 it didn't cause cancer in those people. That is  
8 absolute proof. Those people who have never used  
9 tobacco didn't get cancer from tobacco. That is for  
10 sure.

11 Now, with those things in mind, let's look  
12 at the evidence. Let's start with Doctor Carl Hook.  
13 Now, I'm not so much interested in what a witness  
14 says his opinion is as I am in why he holds that  
15 opinion. What is the basis for the opinion? What  
16 supports the opinion? Now, keep in mind that it is  
17 undisputed that Carl Hook had never seen a case of  
18 tongue cancer in a young person in his entire  
19 practice. He had never heard of a case of tongue  
20 cancer in a young person. He made no effort to  
21 search the literature to see if there had ever been a  
22 tongue cancer in a young person and, if so, what the  
23 official or unofficial scientific opinion was about  
24 it.

25 Furthermore, of course, we know that Doctor



1 Hook didn't ask for consultation. He didn't refer  
2 the patient. He undertook to proceed to treat the  
3 patient. He delayed surgery for six weeks, but then  
4 Doctor Hook comes in and says "Sean Marsee's tongue  
5 cancer was caused by Copenhagen Snuff."

6 Well, he didn't learn that from his own  
7 clinical experience. He didn't learn it from  
8 anything in the literature. In fact, he admitted  
9 quite frankly that he knew of no literature  
10 supporting the proposition that tongue cancer in  
11 young people is caused by tobacco.

12 So what is the value of Carl Hook's  
13 opinion? It has value only if you can find some  
14 basis for his opinion, and he has none.

15 Then, let's look at Doctor Westbrook.  
16 Doctor Westbrook is a fine gentleman. He's a friend  
17 of mine. We are both from Little Rock, Arkansas. I  
18 have known Doctor Westbrook for years, but Doctor  
19 Westbrook told you he had never seen a case of tongue  
20 cancer in a young person in his practice. He told  
21 you that he had not read anything before he was asked  
22 about this case about tongue cancer in young people.  
23 And he told you that after he did read it, that he  
24 found out that apparently all the literature said  
25 that there was no known cause of tongue cancer in

1 these young patients. And he told you that he knew  
2 of no literature that said there was.

3 Now, in that connection I think you can now  
4 see why the Court tells you don't let sympathy or  
5 emotion play any part in your verdict, because,  
6 ladies and gentlemen, every one of those young people  
7 who had never used tobacco in any form who had tongue  
8 cancer and died suffered just like Sean Marsee did,  
9 and their parents and their families suffered just  
10 like the Marsee family did, but they didn't use  
11 tobacco and they didn't come in asking for 146  
12 million dollars from somebody because of that.

13 And another thing that Doctor Westbrook told  
14 you that I found very interesting. That was that he  
15 formed the opinion that tobacco causes tongue cancer  
16 after he was contacted with regard to the Marsee  
17 case. Now, here's a doctor who has been practicing  
18 for some time. He's done a study himself in 1975 of  
19 cancer of the buccal mucosa and gum that he found in  
20 his opinion to be related to the use of snuff or  
21 tobacco. And yet he hadn't formed any opinion  
22 whatsoever about snuff causing cancer of the tongue  
23 and especially cancer of the tongue of young people  
24 until he was contacted with regard to Sean Marsee.  
25 And quite amazingly, Doctor Lijinsky, who had done

1 research with nitrosamines. Of course, he had never  
2 done any research with snuff, and he had never had  
3 anything to do with research as far as human beings  
4 were concerned, but he had done research in  
5 nitrosamines for years, and lo and behold, he didn't  
6 decide that snuff caused cancer to the tongue until  
7 he talked to Mr. Braly.

8 Now, ladies and gentlemen of the jury, that  
9 is the testimony in this lawsuit. And the only other  
10 live witness was Doctor Breslow, and Doctor Breslow  
11 is an epidemiologist. Doctor Breslow would be  
12 interested in what was shown by studies in the human  
13 population, I assume. And Doctor Breslow thought  
14 that the Winn report was really something you could  
15 hang your hat on. And perhaps you recall what Doctor  
16 Breslow said when I asked him, "What did the Winn  
17 report show with regard to tongue cancer?"

18 He said, "I don't know."

19 Now, here is an epidemiologist who is being  
20 asked to testify in a lawsuit involving a tongue  
21 cancer, and he hasn't even attempted to find out what  
22 the only epidemiological study that he knows of in  
23 the United States throwing any light on the subject  
24 shows with regard to tongue cancer from the use of  
25 tobacco.

1 Well, we have decided that maybe that would  
2 be of interest to you. So we got Doctor McCrae to  
3 come in and tell you what the data from the Winn  
4 report showed. And, oh, he got abused and criticized  
5 because he traveled all the way from London to  
6 testify.

7 Let me ask you this. Has anybody ever  
8 questioned the accuracy of his testimony? Has  
9 anybody ever questioned his computations or the facts  
10 that he got from the Winn report, the Winn data? If  
11 they have, I haven't heard it.

12 And he told you that he had studied the data  
13 with regard to tongue cancer backwards and forwards  
14 from every direction and he had come to the  
15 conclusion that there was no  
16 statistically-significant relative risk from the use  
17 of tobacco and the occurrence of tongue cancer, and  
18 that's what the Winn Study showed.

19 And then he got accused of slicing the  
20 onion, because he wanted to find out what the Winn  
21 Study showed about tongue cancer, which was what this  
22 lawsuit is about, he got accused of slicing the  
23 onion. And when Doctor Deborah Winn eliminated death  
24 cases, eliminated every other site of cancer except  
25 the buccal mucosa, eliminated every patient in the

1 hospital except white patients, eliminated everybody  
2 who had used snuff for less than 50 years, then she  
3 apparently came up with something that hadn't  
4 resulted from slicing the onion. She had sliced the  
5 onion to the point there wasn't any onion left, and  
6 it came up with a 47.5 relative risk. For what? For  
7 cancer of the buccal mucosa and gums.

8 So when we asked Doctor McCrae to look at  
9 tongue cancers, we thought we were directing his  
10 attention to the issue in this lawsuit. Now, Doctor  
11 Macrae didn't testify with regard to the cause of  
12 Sean Marsee's cancer wouldn't pretend to testify to  
13 that. He was called to testify as a biostatistician  
14 or medical statistician as to what figures show.

15 We had two other witnesses who were not  
16 causation witnesses, but I would like to mention them  
17 for just a moment. Doctor Shafer. Doctor Bill  
18 Shafer, recognized as, well, according to Doctor  
19 Park, who was a witness whose deposition was taken by  
20 the plaintiff, I don't think he wound up being the  
21 plaintiff's witness, but his deposition was taken by  
22 the plaintiff, testified that Doctor William Shafer  
23 is the father of oral pathology. And he came in to  
24 testify about what he had done in his capacity as a  
25 member of the Scientific Advisory Board of the

1 Smokeless Tobacco Research Council to further  
2 research into smokeless tobacco and health. And he  
3 got abused, accused of being a tool of the tobacco  
4 industry and every effort was made to humiliate him,  
5 but he still has the position in the scientific  
6 community of being an eminent scientist, and that's  
7 the reason that he was selected to be a member of the  
8 Scientific Advisory Board.

9 Then Doctor Furst, the toxicologist. There  
10 has been all this talk about nitrosamines, so Doctor  
11 Furst was asked to come and testify. And he didn't  
12 testify about causation. He testified about the  
13 general subject of toxicology, animal studies and  
14 things of that nature as a chemist. And he wound up  
15 with some tortured figuring to try to show that use  
16 of Copenhagen Snuff for six years somehow can be  
17 transformed into 15 years and in an 18-year-old boy  
18 can be transformed into a 60 year old person. And if  
19 you tell me how you can hold tobacco in your mouth  
20 for 15 years over a six-year period, I don't know how  
21 you would do it.

22 But, in any event, the reason that he was  
23 put through this tortured logic was why? It was  
24 because he had testified that Doctor Hecht, a witness  
25 for the plaintiff, had done some research and had

1 come up with the theory that from that research it  
2 was possible that nicotine might act as a competitive  
3 inhibitor of the metabolic activation in the oral  
4 mucosa of NNN and NNK.

5 And Doctor Furst said that sounded  
6 reasonable to him because snuff didn't cause cancer  
7 in animals, but the components, some nitrosamines  
8 did, so it might be that the snuff somehow acted as  
9 an inhibitor. And all he was doing was agreeing with  
10 Doctor Hecht and Doctor Lijinsky. Another witness  
11 for the plaintiff agreed with Doctor Hecht that that  
12 was apparently what Doctor Hecht's experiments  
13 showed.

14 I suspect now that the scientific community  
15 is breathlessly awaiting an explanation from Mr.  
16 Braly on peanut butter and mushrooms. They also  
17 happen to be noncarcinogenic in their form as peanut  
18 butter and mushrooms, but they have things in them  
19 that are carcinogenic. But let's get down to the  
20 witnesses who testified on the issue of causation.

21 Now, Mrs. Braly talks about what United  
22 States Tobacco Company is going to say. I am the  
23 spokesman for United States Tobacco Company, and what  
24 I am going to say is what these people said from the  
25 witness stand and what the literature says. I'm not

1 going to say anything as coming from me and,  
2 therefore, United States Tobacco Company is not going  
3 to tell you anything coming through me except what  
4 the witnesses have told you. That's what we are here  
5 to hear. That's what you were selected to hear.

6 And let me tell you not only what the  
7 witnesses said, but who they were. And let's start  
8 with Doctor Ackerman. There is no possible question  
9 of Doctor Ackerman's position in the scientific  
10 world. Doctor Ackerman wasn't sitting in that  
11 witness chair in the other room putting his  
12 reputation on the line with testimony that he didn't  
13 believe in wholeheartedly. And he told you that this  
14 tongue cancer was not caused by snuff, in his  
15 opinion, and he told you why he didn't think it was.

16 Lauren Ackerman is no friend of the tobacco  
17 industry. Lauren Ackerman back in 1948 wrote a paper  
18 about verrucous carcinoma in the buccal fold, but  
19 Lauren Ackerman knows the difference between the  
20 buccal mucosa and the gums and the tongue.

21 Doctor Binnie from Baylor College of  
22 Dentistry in Dallas, Doctor Binnie told you that in  
23 his opinion this tongue cancer was not caused by  
24 tobacco.

25 Doctor Hansen from San Francisco. Doctor



1 Hansen, incidentally, was one of those invited to  
2 attend the Malmoe conference that Doctor Axell headed  
3 up and that was talked about so much about Doctor  
4 Pindborg. We will get to that later.

5 Doctor Hansen told you that in his opinion  
6 snuff did not cause this tongue cancer. Doctor  
7 Helfrick -- Remember Doctor Helfrick? He is the one  
8 who said that he abhorred snuff. And he sat there on  
9 that witness stand and told you that snuff didn't  
10 cause that tongue cancer, and he told you why he was  
11 here. Said he was here because if people accepted  
12 the fact that tongue cancer was caused by tobacco,  
13 that that was all there was to the question, that  
14 they would quit looking for other causes and the  
15 people who didn't use tobacco and got tongue cancer  
16 would go on and on with nobody trying to find out  
17 what was happening and how to stop it.

18 Doctor Axell. Well, Doctor Axell came a  
19 long way and he took quite a bit of abuse as a  
20 witness, and I think you might be interested in  
21 knowing with regard to Doctor Axell that Doctor Gupta  
22 really was responsible for Doctor Axell being here,  
23 because during the deposition of Doctor Gupta -- and  
24 you may not remember it, but it's in the transcript  
25 of his deposition -- he was asked, "Are you familiar

1 with the work that has been done in Sweden by Doctor  
2 Axell?"

3 And he said, "I am familiar with it."

4 The next question was: "That work has been  
5 described by Doctor Pindborg as being the most  
6 comprehensive study of oral buccal diseases ever  
7 undertaken. Would you agree with that evaluation of  
8 it?"

9 "Answer: In the Western World, I think."

10 So Doctor Pindborg, who is prominently  
11 mentioned, listed as a witness for the plaintiffs,  
12 but never appeared, thought that Doctor Axell had  
13 done the most comprehensive study of oral mucosal  
14 diseases ever undertaken in the Western World, and  
15 Doctor Gupta agreed with Doctor Pindborg. So we  
16 thought that somebody who apparently was generally  
17 recognized as an authority might be somebody you  
18 would like to hear from.

19 And, finally, Doctor Byers. Doctor Byers  
20 had done a study on tongue cancer in young people.  
21 Doctor Byers told you what he thought about this,  
22 told you that in his opinion there was no  
23 relationship between the tobacco, the snuff, and the  
24 tongue cancer.

25 Doctor Byers is at M.D. Anderson; so is

1 Doctor Helfrick. Doctor Byers, before he came to  
2 Oklahoma City to testify told Doctor Le Maister what  
3 he was going to do, and Doctor Le Maister the  
4 national president of the American Cancer Society in  
5 addition to being the president of M.D. Anderson  
6 Hospital. And, Doctor Le Maister said, in effect,  
7 let your conscience be your guide.

8 And the reason that Doctor Byers was here  
9 was because of his conscience. Doctor Byers didn't  
10 want to help U.S. Tobacco Company. He didn't come up  
11 here without having sympathy for Mrs. Marsee. Do you  
12 think there was a doctor who sat on that stand who  
13 didn't sympathize with the Marsee family? Doctor  
14 Byers felt the truth was important, sufficiently  
15 important to come and testify when it was really  
16 something he would have preferred not to do. He  
17 didn't want to come testify for U.S. Tobacco Company,  
18 but he did. He was trying to tell you something. He  
19 was trying to tell you that it is important that this  
20 lawsuit be decided on science, not emotion.

21 And how about Doctor Rohrer? There was an  
22 interesting witness. Doctor Rohrer was approached  
23 approximately a year before I ever knew he existed by  
24 Mr. Braly. Now, Doctor Rohrer's preference and the  
25 popular thing for Doctor Rohrer to do would have been

1 to testify in favor of the plaintiff. But his  
2 conscience wouldn't let him, and he told Mr. Braly,  
3 "I can't help you. This isn't right."

4 And when I talked to Doctor Rohrer and said,  
5 "Doctor Rohrer, will you come in and tell the jury  
6 what the science dictates in this case?" He said,  
7 "Yes."

8 And he told you, and you don't have to  
9 believe it, but he told you he wasn't doing it for  
10 money. Now, I imagine Mr. and Mrs. Braly think money  
11 is everything, but it's not to conscientious people  
12 like the witnesses we presented to you here.

13 And let me tell you something else about  
14 this lawsuit that is to me the strangest and most  
15 interesting thing about it. Sean Marsee was treated  
16 by dozens of doctors in addition to Doctor Hook, and  
17 not one of them has come in here and testified that  
18 Sean Marsee's tongue cancer was caused by snuff, not  
19 a single one.

20 And what did Doctor Sobol say in his medical  
21 report. He said, "In view of the above findings,  
22 previous surgery and pathology, tempered with an  
23 understanding that carcinoma -- " that's cancer --  
24 "of the anterior mobile tongue does indeed occur in  
25 patients under the age of 30 who are effectively

1 nonsmokers."

2 And Mrs. Marsee tells you that she didn't  
3 ask any other doctor what he thought about what  
4 caused Sean's tongue cancer and hadn't at the time of  
5 her testimony to this day asked him. Can you believe  
6 that any doctor who treated Sean Marsee and really  
7 thought that his cancer was caused by snuff wouldn't  
8 be in this courtroom?

9 One other interesting thing about Doctor  
10 Hook. When Doctor Westbrook was contacted, Doctor  
11 Hook sent a message through Mr. Braly to have Doctor  
12 Westbrook call him. And what do you think he wanted  
13 to talk about? The testimony of both Doctor  
14 Westbrook and Doctor Hook is that he talked about one  
15 thing and one thing only, and that was "what did you  
16 think of my treatment."

17 Doctor Hook never asked Doctor Westbrook  
18 what he thought about Sean Marsee or what caused Sean  
19 Marsee's cancer. All Doctor Hook wanted to know was  
20 "what did you think of my treatment." And Doctor  
21 Byers tells you that Sean Marsee should have been  
22 referred, in his opinion, that he didn't tell you  
23 that would have made any difference in the outcome,  
24 and I don't know that it would. I am not telling you  
25 that it would, but the fact of the matter is that

1 Doctor Hook was no more competent to testify about  
2 the cause of Sean's tongue cancer than he was  
3 competent to treat him in the first place, because he  
4 didn't know anything about tongue cancer in an  
5 18-year-old. And that's the plain truth of the  
6 matter.

7 Now, there has been a lot of talk about  
8 nitrosamines. And I am going to make you a little  
9 promise, if I use all of my hour-and-a-half, I am  
10 going to be even madder at me than you are, but I do  
11 have a number of things I want to touch on.

12 Nitrosamines. Nitrosamines are an  
13 out-and-out smoke screen. "Nitrosamines cause  
14 cancer. You know we are going to prove it. We are  
15 going to take you to India. We are going to show  
16 that Copenhagen Snuff and all those nitrosamines  
17 cause cancer by taking you to India."

18 They don't have any Copenhagen Snuff in  
19 India. They don't even have any snuff in India. And  
20 the tobacco that they chew has a smidgen of  
21 nitrosamines compared to moist snuff, which they  
22 don't use. And then when we get to India to find out  
23 why nitrosamines in Copenhagen cause cancer, we find  
24 out that apparently smoking, reverse smoking, pipe  
25 smoking, hookah smoking, chewing, materials that

1 don't contain tobacco, all those things cause cancer  
2 in India.

3 Now, whether that chew that they use over  
4 there that they don't put any tobacco in has any  
5 nitrosamines or not, I don't know. I haven't heard  
6 any testimony that it did.

7 Now, what in the world does that have to do  
8 with nitrosamines in Copenhagen Snuff in the United  
9 States? And why is it that in India where the  
10 nitrosamine level is so low the incidence of cancer  
11 is so high, and in the United States where the levels  
12 of nitrosamines are so high, the incidence of cancer  
13 of the mouth or the tongue is so low? Those are the  
14 kind of figures that are kind of informative.

15 And let's take the Winn Study. Oh, the Winn  
16 Study, it proves everything. And what kind of snuff  
17 did they use in the Winn Study? They used dry  
18 snuff. They didn't use Copenhagen; they didn't use  
19 Skoal; they didn't use any kind of moist snuff. And  
20 how many nitrosamines are there in dry snuff? So far  
21 as I know, nobody has ever found out. At least, they  
22 didn't tell you about it if they knew.

23 So we are going to prove that the level of  
24 nitrosamines in Copenhagen Snuff causes cancer by  
25 using studies from India where they don't have any

1 kind of snuff and by using the study of Doctor Winn  
2 which involved dry snuff and which with regard to  
3 tongue cancers did not establish any increased risk  
4 that was statistically significant.

5 And while I am talking about India, Doctor  
6 Gupta, I don't know whether you remember this  
7 testimony or not, but I will tell you about it, and I  
8 could read it to you if I had more time. Doctor  
9 Gupta didn't know where the cancer was and didn't  
10 know where he held the quid. And he finally said,  
11 "Well, the cancer was in the mouth and he put the  
12 quid in the mouth."

13 Now, ladies and gentlemen, if I had brought  
14 a witness in here and put him on the stand and he had  
15 said, "I don't know where the cancer was and I don't  
16 know where he put the quid, but that snuff didn't  
17 cause his cancer," you would have died laughing. But  
18 that's what Doctor Gupta said. Another thing Doctor  
19 Gupta's testimony proved was that not only are you  
20 more likely to have cancer if you live in India  
21 rather than the United States, but you could select  
22 districts in India where they don't have any cancer  
23 according to their study.

24 Of course, if you find that, you throw those  
25 districts out, you don't study them any more. But



1 not only is there a difference between countries, but  
2 there is a difference between districts within the  
3 countries. And they found out, as was pointed out,  
4 that people who used a chew that didn't contain  
5 tobacco had apparently the same risk of cancer  
6 generally as the people who used a chew that did  
7 contained tobacco and those that used a chew that  
8 didn't contain tobacco had of getting cancer of the  
9 tongue.

10 Now, what did that prove about Sean Marsee?

11 Nitrosamines were brought in in an effort to  
12 explain the mechanism of how Copenhagen Snuff caused  
13 cancer, but not only did all of these witnesses tell  
14 you that there is no scientific evidence that snuff  
15 causes cancer of the tongue in young people, but all  
16 of the literature that anybody has been able to find  
17 tells you that.

18 Now, I didn't create that literature. I  
19 found it, with help, but I didn't create it. The  
20 U.S. Tobacco Company didn't create that literature.  
21 It was there, going back to the 1950's. And it told  
22 you not only that in all of that literature nobody  
23 could come to any conclusion that tobacco was  
24 involved in any way in cancer of the tongue in young  
25 people, but every witness told you, and I know of no

1 other literature that does reach that conclusion.

2 Now, you say, "Well, some of the people used  
3 tobacco." Well, look, if there is anything out there  
4 that's causing cancer, the people who use tobacco are  
5 running the same risk as the people who don't use  
6 tobacco. It would be absolutely amazing if people  
7 who use tobacco didn't get the same cancer that  
8 people who didn't use tobacco were getting. You  
9 would begin to think tobacco kept you from getting  
10 cancer, and I don't think anybody has ever contended  
11 that.

12 The truth of the matter is that every effort  
13 has been made to avoid talking about tongue cancer by  
14 the plaintiffs. And I made every effort to talk  
15 about it, because that is what this lawsuit is about  
16 is tongue cancer. And, ladies and gentlemen of the  
17 jury, when you retire to the jury room, if you  
18 conclude from the evidence, as I think you  
19 necessarily must, that snuff did not cause Sean  
20 Marsee's tongue cancer, then that's the end of the  
21 lawsuit, because you have to find from a  
22 preponderance of the evidence that it was a cause in  
23 order to return a verdict for the plaintiffs in any  
24 amount.

25 But since I know you are going to hear

1 something about things like marketing and warnings,  
2 that sort of thing from Mr. Braly, let me touch on  
3 those subjects just briefly.

4 Marketing. What does marketing have to do  
5 with Sean Marsee? He started out using Red Man  
6 tobacco. That was the beginning of his tobacco use.  
7 Red Man tobacco is not manufactured by U.S. Tobacco  
8 Company. It is a chewing tobacco. It is not  
9 advertised by U.S. Tobacco Company. So far as I  
10 know, it is not advertised by anybody.

11 And then according to the testimony Sean  
12 Marsee switched to Skoal, and the reason he switched,  
13 according to my understanding of the testimony, was  
14 peer pressure of his Boy Scout troop. And he didn't  
15 say he started using tobacco because of Walt  
16 Garrison. He didn't say he had ever watched a TV  
17 show that enticed him, according to Mrs. Braly, to  
18 use tobacco. Where is there any evidence that he was  
19 enticed to use tobacco? It just doesn't exist.

20 I know that a lot of youngsters probably  
21 look up to Walt Garrison. I do myself. I really  
22 have been pleased to have had the opportunity to know  
23 Walt Garrison. But there ain't no way he's ever  
24 going to sell me a can of snuff, I promise you that.  
25 I look up to Earl Campbell. One of the happiest days

1 of my life was the day that Earl Campbell graduated  
2 from the University of Texas, and I'll bet you that  
3 that feeling was shared by every Arkansas Razorback  
4 fan in the state.

5 But that doesn't mean either that he appeals  
6 only to young people or that he's going to cause  
7 anybody to start using a product because he gets on  
8 TV and advertises it, because he uses it.

9 I admire John McEnroe as a tennis player,  
10 but if he will tell me what kind of shoes he wears,  
11 I'll guarantee you I will never buy a pair.

12 Addiction? What evidence is there that Sean  
13 Marsee was addicted to anything? I think one of his  
14 brothers testified that he tried to quit. Mrs.  
15 Marsee and his sister both testified that they never  
16 knew him to try to quit. There is no evidence of  
17 addiction, none whatsoever. That's why we didn't  
18 feel like we ought to waste your time putting on any  
19 testimony about addiction, so we didn't.

20 Warnings? The Congress of the United States  
21 has seen fit in 1986 to pass a statute that will  
22 require warnings on snuff beginning, I believe, in  
23 January of 1987, and the United States Tobacco  
24 Company will comply with the law, I assure you. But  
25 until 1986 every time that Congress has considered

1 tobacco products and warnings, they have made no  
2 requirement that warnings be placed on the snuff  
3 starting with cigarettes, they had the little cigars,  
4 never have they added snuff.

5 In 1979, the Surgeon General found that in  
6 spite of the Asian studies, there was no  
7 justification for concluding that smokeless tobacco  
8 caused cancer. And speaking of warnings, the  
9 warning? Sweden doesn't say a word about cancer, not  
10 one single word.

11 Now, a decision was made on the basis of  
12 judgment not to put a warning on a package, and  
13 whether that decision was right or wrong could be  
14 argued until the end of the world, but if you come to  
15 the conclusion from the scientific evidence that  
16 snuff did not cause Sean Marsee's tongue cancer, then  
17 that question is totally moot.

18 We had what were to me some interesting  
19 little side lights in this lawsuit. We had a dispute  
20 as to who was with Sean Marsee on the first visit to  
21 Doctor Hook. And I never did understand what that  
22 was about or how it came about or why there was ever  
23 any problem with it, but Doctor Hook testified that  
24 he made a note of the fact that Sean's mother was  
25 with him and Mrs. Marsee in her deposition said that

1 she was with him, as I recall, and then she  
2 apparently changed her mind, which is perfectly  
3 permissible, if she changes her mind, thinks she  
4 wasn't with him, but then Doctor Luke changes his  
5 mind and decides that -- he testified in his  
6 deposition she was with him. I don't know what that  
7 is all about, but it was kind of interesting.

8 And where he placed the snuff. I don't know  
9 what the problem was there. He either placed it here  
10 or he placed it here (indicating), and I don't have  
11 the slightest question in my mind that if he placed  
12 it here, he moved it back with his tongue. I don't  
13 doubt that. But I know one thing. He did not -- he  
14 held that quid between his cheek and his gum, and  
15 that quid was in direct contact with his gum and was  
16 in direct contact with his cheek and there was not a  
17 sign of any abnormality whatsoever with either the  
18 cheek or gum, and that's undisputed.

19 And if he did move it with his tongue, he  
20 would move it with the tip of his tongue and there  
21 wasn't a sign of any problem with the tip of his  
22 tongue.

23 So the theory is that it is the saliva that  
24 caused the problem. Now, in the buccal mucosa cases,  
25 the theory is that it is the direct contact, and

1 that's how you reach the conclusion it must be the  
2 snuff causing the cancer because its direct contact,  
3 see, it's right there where they held the quid,  
4 that's the argument. But then if it doesn't develop  
5 right there where they hold the quid, then there is  
6 some argument that wherever it develops is still the  
7 snuff problem.

8 Well, if saliva is what is involved on  
9 Doctor Westbrook's cesspool theory, the principal  
10 collection of saliva is in the floor of the mouth,  
11 which would be under the tongue on the floor of the  
12 mouth. And if the saliva is the problem, how does  
13 the saliva select the right lateral border of the  
14 tongue? Saliva is all over the mouth. If you got  
15 all these nitrosamines running around there in the  
16 saliva, why aren't they causing cancer everywhere in  
17 the mouth?

18 Ladies and gentlemen of the jury. I think  
19 that it is abundantly clear from the testimony in  
20 this case that Sean Marsee's cancer of the tongue was  
21 not caused by snuff, but that's not what you have to  
22 find. What you have to find in order to return a  
23 verdict for the defendant is that it has not been  
24 proved that the snuff did cause the cancer.

25 Now, I know the question if snuff didn't

1 cause it, what did? And I know the answer, and the  
2 answer from the witness stand from every witness,  
3 plaintiff and defendant was "I don't know."

4 You don't have to come up with what did  
5 cause his cancer. If your answer is I don't know,  
6 then, it has not been established to your  
7 satisfaction that snuff caused it, and your duty is  
8 clear. Don't let me forget those five cases from  
9 India, had five youngsters, two eleven years old, two  
10 16 years old, and one 17 years old. Four of them had  
11 never used tobacco and one of them had chewed tobacco  
12 for one year. And all five of them had cancer of the  
13 right lateral border of the tongue, exactly where  
14 Sean Marsee did. And everybody will have to agree  
15 that tobacco didn't cause the tongue cancer in four  
16 of them. And I would have thought that everybody  
17 would have to agree that it didn't cause the cancer  
18 in the fifth one and Westbrook, Doctor Westbrook did  
19 agree with that. He was asked what caused the cancer  
20 in those four, and he said, "I don't know." He said  
21 -- he was asked what caused the cancer in the fifth  
22 one, and he said "I don't know." But not Doctor  
23 Lijinsky. Doctor Lijinsky said that tobacco caused  
24 the tongue cancer in one of them and he didn't know  
25 what caused it in the other four. Now, if that's



1 science, I don't understand it. I don't see how  
2 anybody who claimed to be a scientist could say,  
3 "snuff caused it in one but I don't know what caused  
4 it in the other."

5 And, ladies and gentlemen of the jury, when  
6 Doctor Westbrook tells you, if I've got snuff and  
7 cancer, I don't have to look any further, he's  
8 telling you something that is bad for science,  
9 because if people start taking that attitude, then  
10 there are going to be people out there having tongue  
11 cancer and dying of it and nobody trying to figure  
12 out why. And that brings me to Doctor Bloodgood.

13 Doctor Bloodgood decided in 1921 that all he  
14 had to do to prevent tongue cancer, tongue cancer, a  
15 preventable disease, was to get people to stop using  
16 tobacco. And Doctor Bloodgood was wrong and  
17 everybody admits he was wrong because the witnesses  
18 have testified you can ban tobacco from the face of  
19 the earth and you will still have tongue cancer. And  
20 we need to find out why. We don't need to have  
21 people who are supposed to be scientists saying, "oh,  
22 well, if there is snuff involved, that's the end of  
23 it, I am not going to look any further."

24 That's what these witnesses came here to try  
25 to tell you. That's why I was able to get people of

1 that caliber to come here and testify, because they  
2 know the importance of continuing to try to find out  
3 what's causing the cancer in young people when they  
4 know it is not tobacco.

5 And I submit to you that cancer in other  
6 sites in the mouth are of no more relevance than lung  
7 cancer in tobacco smoking. And whether tobacco  
8 smoking causes lung cancer has nothing whatsoever to  
9 do with this lawsuit and whether a quid placed in the  
10 buccal mucosa between the cheek and the gum causes  
11 cancer where the quid is placed if it does, has  
12 nothing to do with this lawsuit, and that's the  
13 reason I haven't talked about it.

14 You all are most kind. Thank you.

15 THE COURT: Ladies and gentlemen, we will  
16 take another brief recess, another ten-minute recess  
17 at this time. Again, remembering my admonitions to  
18 you, everyone remain seated while the jury exits for  
19 ten minutes.

20 Court will be in recess for ten minutes.

21 (A brief recess was here had.)

22 THE COURT: Be seated. Ladies and  
23 gentlemen, Mr. Braly will make the rebuttal argument  
24 in behalf of the plaintiff.

25 Mr. Braly.

1 MR. BRALY: Thank you, Your Honor.

2 If it please the Court, ladies and gentlemen  
3 of the jury. On my own behalf and on behalf of Mrs.  
4 Marsee and my law partner, let us thank you. I find  
5 it somewhat fitting that this comes to a conclusion  
6 in the same courtroom where it commenced some five  
7 weeks ago. Mr. Jennings wanted to talk about the  
8 scientific evidence. I assure you that I do, too.

9 I think one of the most startling aspects of  
10 Mr. Jennings' remarks was his complete and total  
11 failure to deal with the problem of one particular  
12 nitrosamine in snuff called nitrosomorpholine that  
13 has been shown to cause cancer of the tongue in  
14 laboratory animals at very, very low dose levels. He  
15 didn't mention that. I think you should hold it  
16 against him.

17 Of course, the reason he didn't mention it  
18 is because he didn't have any expert witnesses to  
19 come and testify to you that really knew anything  
20 about nitrosamines. Stop and think about it a  
21 minute. When Doctor Shafer got to the witness stand,  
22 he didn't know anything about nitrosamines, and I  
23 wasn't hard on that kind man. I felt sorry for the  
24 man, because this tobacco company had taken a good  
25 oral pathologist who's written a good oral pathology

1 textbook, which, by the way, blames tobacco for a lot  
2 of things, and suggests that the the way you get rid  
3 of leukoplakia is to quit using tobacco and the way  
4 you get rid of leukoplakia on the tongue is to quit  
5 using tobacco. That's all in the textbook that is  
6 sitting there in a box.

7 But that good gentleman got on the witness  
8 stand, and this tobacco company had not been -- Let's  
9 just put it this way. The tobacco company had not  
10 bothered to inform him that they had known back in  
11 1974 about nitrosamines in their snuff. You may  
12 recall that he was somewhat concerned about that, and  
13 as I recall, he sort of agreed that warnings should  
14 have been put on when that was known. And after he  
15 learned that, and he learned it for the first time on  
16 the witness stand, he got off the witness stand and  
17 he was shaking his head. I don't know why he was  
18 shaking his head, but I think shaking his head in  
19 disbelief that somebody hadn't bothered to tell him  
20 before they called him in here to put him on the  
21 witness stand.

22 I think that was deception on the part of  
23 the tobacco company, deception of their own witness.  
24 And I think it is somewhat characteristic of this  
25 tobacco company's actions in the way they have

1 approached this trial.

2 One of the really startling things is that  
3 this tobacco company has not been willing to bring to  
4 you, to put in the witness chair, a live company  
5 witness that knows anything about the science of  
6 snuff and carcinogens. I had to go take their  
7 deposition or you would never have heard from them,  
8 because the company sure as the devil was not going  
9 to bring them here so that you could judge their  
10 credibility in person. They keep them hiding in  
11 their corporate headquarters in Greenwich,  
12 Connecticut.

13 And if you stop and think a minute about the  
14 testimony of Doctor Richard Manning, about two weeks  
15 ago now, maybe two weeks ago today, you recall that  
16 man? That man speaks in what I have come to call  
17 since this lawsuit started -- and I have given it a  
18 name sort of like the doctors have given this cancer  
19 that snuff dippers call it, and they call it snuff  
20 dipper's cancer -- I call the kind of things that  
21 Doctor Manning testified to "snuffspeak," because  
22 that's all it was. Do you remember?

23 "I don't know what safe is. I don't know  
24 what dangerous means. I'm an organic chemist that  
25 has been working in the tobacco industry for 17

1 years, and I am the director of research and  
2 development for the United States Tobacco Company. I  
3 can't tell you how much nicotine is in the product.  
4 I am an organic chemist who has been in charge of  
5 reviewing the scientific literature on the subject of  
6 snuff and its safety."

7 And then I asked him what I think is the  
8 most important question that has been asked of a  
9 tobacco company witness. And that was: "Doctor  
10 Manning, can you tell us what a carcinogen is?" And  
11 this man who is supposed to be in charge of reviewing  
12 the scientific literature for the United States  
13 Tobacco Company sat there, I had to ask him, you may  
14 recall I had to ask him most questions two or three  
15 times in order to get any answer out of him; but when  
16 I finally got an answer out of him, his answer was,  
17 "I don't know what a carcinogen is."

18 And then a few questions later in  
19 frustration, and off the top of my head, I said, "By  
20 the way, Doctor Manning, is there anybody else in the  
21 United States Tobacco Company that knows more about  
22 this subject than you do?" Do you remember his  
23 answer?

24 "No, there is not."

25 Ladies and gentlemen of the jury, I suggest

1 that that kind of evasion is typical of the  
2 "snuffspeak" and the evasion of the true issue that  
3 have taken place. We have never tried to say that  
4 tongue cancer doesn't occur in young people for  
5 unknown reasons. All we have tried to say is to get  
6 the tobacco company to admit that it occurs in old  
7 people for unknown reasons, too. It occurs in every  
8 age group for unknown reasons, and that's something  
9 that Doctor Westbrook told you was the background  
10 incidence of these tongue cancers.

11 And no, we cannot tell you and there is  
12 nothing in this world we can do to convince you or  
13 anybody else absolutely that Sean Marsee's tongue  
14 cancer was a result of dipping snuff, but that's not  
15 what we are here for. We are not here for scientific  
16 certainty, and the Court will so instruct you. We  
17 are here to make a simple determination of was it  
18 more likely than not that Sean's snuff was not the  
19 only cause of his tongue cancer, but was a direct  
20 cause of his tongue cancer. And that's all there is  
21 in this causation question.

22 And while it is very important to look at  
23 all the other things that are involved in snuff, such  
24 as the addiction and all the other cancers that it  
25 causes in the other parts of the oral cavity, if you

1 answer that one question, then those are brought into  
2 this thing in large measure just because the evidence  
3 is so overwhelming that snuff causes cancer in human  
4 beings that there is absolutely no excuse for the  
5 tobacco company to have ignored that.

6 But I am going to try to and slice through  
7 all of that for you just a minute and get this thing  
8 down to something really, really simple. Before I do  
9 that, I want to show you one thing. You have seen  
10 this before. It's this chart. It shows nitrosamines  
11 in snuff. It doesn't show all 19 of them. It shows  
12 7 of them. And it shows you that out of the 7 that  
13 Copenhagen is the highest in NPYR, it's the highest  
14 in nitrosomorpholine, it's the highest in  
15 nitrosodiethanolamine, it's the highest in  
16 nitrosoanabasine, it's the highest in this one, which  
17 I cannot pronounce, NNK, -- it is not the highest in  
18 NNK, it is right up there, but it is the highest in  
19 NNN.

20 Nitrosomorpholine. Is it a carcinogen and  
21 did the tobacco company know about it? Yes. We have  
22 this company document to show us that they did.  
23 Right down here -- understand, this has been reported  
24 back all the way to '79 or something in their snuff.  
25 But they finally recognized it, and who recognizes



1 it? Thomas Ito, Director of Research and Development  
2 Services, in a letter to the senior vice-president of  
3 manufacturing, Tim Cornell, he gets down here, and  
4 they list the nitrosomorpholine and then he says,  
5 "Nitrosomorpholine is a relatively potent animal  
6 carcinogen."

7 He talks about the others, but in  
8 characterizing the levels of nitrosomorpholine that  
9 are found in their snuff products, how does he  
10 characterize them? Does he say, "Well, there are  
11 just trace amounts"? Does he say, "They are low  
12 levels"? Are they small amounts? Medium amounts?  
13 No, he doesn't say any of those.

14 He does tell us what the tobacco company  
15 considers those levels to be. And he does it right  
16 here, "the high concentration of volatile  
17 nitrosamines" that's these four and this one is  
18 nitrosomorpholine and it is the highest of those that  
19 are considered to be the high concentration.

20 And how high is it in Copenhagen? It is up  
21 to 690 parts per billion. How does that compare with  
22 other products? Things like beer, bacon, they're so  
23 far off the scale. And this is a log scale. At  
24 least one of you, I'm sure, understands a log scale.  
25 I don't know about the rest of you. If you put this

1 on a linear scale, this stuff would be running up the  
2 side of the wall of this courtroom.

3 If you will recall, Doctor Hecht calculated  
4 for us and said in order to get the same dose of  
5 nitrosamines from beer you would have to drink 1200  
6 quarts a week that Sean Marsee got from four cans of  
7 snuff, some enormous number. In order to get that  
8 dose of nitrosamines from bacon you would have to eat  
9 a ton of bacon a week that Mr. Sean Marsee got from  
10 his four cans or four-and-a-half cans of snuff.

11 Now, I promised you I was going to try to  
12 slice through this a little bit and see if I can make  
13 it much simpler. If you take away all of the cheek  
14 and gum cancer cases, you can take away all the  
15 pharynx cases that occur in the back of the throat,  
16 take away all the Indian cancer cases, slice all that  
17 stuff away, and let me throw you one, simple,  
18 straightforward.

19 Suppose you were a doctor or suppose you are  
20 just a mother or a parent, and you got a child or a  
21 patient, and the patient comes in to see you and the  
22 patient has got a tongue cancer, and it is a young  
23 patient, and you haven't seen very many tongue  
24 cancers in young people or haven't seen hardly any of  
25 them. And you diagnose it, you look at it, and you

1 say, "Son," or "Daughter, do you chew snuff or do you  
2 smoke cigarettes?" Those are the two things that are  
3 most frequently associated.

4 "No, I didn't."

5 "Did you do any of those things?"

6 "No."

7 Suppose the child says, "The worst habit I  
8 have got is I chew bubble gum all day long, every  
9 day, chew it in class. All I do is I chew bubble  
10 gum."

11 You say, "Well, all right."

12 I don't know what causes this kid's cancer  
13 and the mother and the doctor tells them, "Mother and  
14 daddy, we don't know what caused this kid's cancer."  
15 And that night if the doctor goes home or if you go  
16 home and pick up a Time magazine or something or a  
17 Newsweek and you open up to the medicine section and  
18 you see an article in there that says, "XYZ brand of  
19 bubble gum has just been discovered to contain high  
20 levels of nitrosomorpholine, a potent chemical  
21 carcinogen, a member of that class of potent chemical  
22 carcinogens that is known to be the most potent  
23 carcinogen known to the world of science, and XYZ  
24 brand of bubble gum contains high concentrations of  
25 that particular nitrosamine, and laboratory studies

1 show that very low doses of that particular  
2 nitrosamine are causing squamous cell carcinoma of  
3 the tongue in laboratory animals," and you read that,  
4 and as you do, you get up and go into your child's  
5 bedroom and you go through his drawer to find some  
6 old bubble gum wrappers and you see that your child  
7 has been using XYZ bubble gum, what are you going to  
8 say to yourself? What is the doctor, if you take the  
9 article to the child's doctor, what is he going to  
10 say to himself?

11 You know the answer, and it's the answer in  
12 this lawsuit. You are going to say to yourself we  
13 are not certain, but it's clearly more probable than  
14 not that that highly potent carcinogen in the bubble  
15 gum is what caused my child's cancer of the tongue  
16 because it has been causing cancer of the tongue, the  
17 same exact kind, squamous cell carcinoma of the  
18 tongue, in laboratory animals.

19 You are not going to sit there and say I'm  
20 still going to guess and think it is something  
21 mysterious or something that is unknowable or  
22 unknown. That is what the tobacco companies always  
23 want you to think.

24 Companies say, "We can't know the cause of  
25 cancer." As long as they can stand there and tell

1 you "we can't know the cause of any cancer," then  
2 they can keep on selling tobacco products and causing  
3 cancer forever without anybody being able to do  
4 anything about it.

5 But I don't think, and ask yourselves, but I  
6 don't think as parents, as mothers or as doctors if  
7 you had that set of facts, the bubble gum thing, that  
8 you would attribute the cause to anything other than  
9 the bubble gum and the fact that the bubble gum  
10 contained the nitrosomorpholine which has been known  
11 to be causing cancer of the tongue in laboratory  
12 animals.

13 Ladies and gentlemen of the jury, I think  
14 this case in many respects is just that simple.  
15 That's why Mr. Jennings didn't talk about  
16 nitrosomorpholine and didn't bother to mention to you  
17 that Doctor Lijinsky's rats were getting squamous  
18 cell carcinoma of the tongue because there was  
19 absolutely nothing they could respond to those  
20 fundamental facts. They evaded those facts. Just  
21 like by bringing Walt Garrison to this courtroom  
22 instead of bringing Richard Manning or Louis Bantle  
23 or Per Erik Lindqvist or Hugh Foley, they have  
24 avoided bringing you anybody that really knows  
25 anything about what is going on inside the company.

1 Nitrosomorpholine is not the only  
2 nitrosamine in snuff. There are huge amounts of  
3 other nitrosamines, carcinogenic nitrosamines, that  
4 are in snuff. This tobacco company has known they  
5 were in snuff since 1974, two years before Sean  
6 Marsee started using any tobacco product. They could  
7 have put a warning, and if they had when Betty Marsee  
8 caught her son using Skoal and Copenhagen when he was  
9 15 years old or so and was faced with a child who  
10 says, "Mom, all the kids in class do it, it is okay,  
11 there's not any warnings on it, it has got to be a  
12 safe alternative to cigarettes, and if it wasn't  
13 safe, there would be warnings, and good people, good  
14 athletes like Walt Garrison would not be advertising  
15 it on TV," if there had been warnings on it then,  
16 there wouldn't have been half or two-thirds of Sean  
17 Marsee's school using snuff, because everybody around  
18 would have been putting the heat on the kids to quit  
19 this dangerous practice.

20 But I imagine there was a large number of  
21 parents out there and a lot of school people out  
22 there and certainly a lot of coaches that thought  
23 snuff is great, it is not smoking. It is not going  
24 to hurt my athletes' wind, and it not going to give  
25 them lung cancer.

1 And they didn't know to the contrary and as  
2 a result snuff through advertising has become an  
3 endemic and epidemic practice among young people, so  
4 much so that in the study that Tony Axell referred to  
5 out of Colorado, he confessed that some 60 percent of  
6 the young snuff dippers in that state had snuff  
7 dipper's lesions in their mouths. Now, you can  
8 quibble all you want to about those leukoplakias  
9 being premalignant lesions. You will remember this  
10 drawing is a drawing that showed the leukoplakia on  
11 the side of Sean Marsee's tongue. You remember the  
12 medical records of the doctor who saw Sean Marsee on  
13 January 11th, he put down "leukoplakia, right lateral  
14 border of the tongue, possible premalignant lesion,"  
15 and then instructed him to stop dipping snuff.

16 We don't know to what extent Sean did or  
17 didn't stop dipping snuff, but we know that some  
18 leukoplakias regress and some have gone so far they  
19 don't. And unfortunately for Sean his was in the  
20 latter category.

21 Ladies and gentlemen of the jury, you  
22 remember the first thing that United States Tobacco  
23 Company did when they found out that they had  
24 nitrosamines in huge levels in their snuff products?  
25 Did they put a warning on it? No.

1           They undertook a study, and Doctor Richard  
2   Manning, this same guy that denies that he knows what  
3   a carcinogen was, wrote in one of those studies and  
4   that whole document is in evidence, I am not sure you  
5   are going to wade through it, but there he says, "Our  
6   first response to the problem of NNN in our snuff  
7   products, our first response to that problem is to  
8   try and discredit Doctor Hoffmann." That's like  
9   cutting off the head of the messenger who brings you  
10   bad news. The first response was not to deal with  
11   this in an ethical and responsible way, but it was to  
12   try and discredit the good hard-working scientist  
13   that had been diligent enough to do what the tobacco  
14   company should have been doing, and that is to  
15   discover the nitrosamines in their snuff because it  
16   had been predicted according to Doctor Hoffmann since  
17   the 1960's, that these nitrosamines would be found in  
18   snuff as soon as the laboratory chemistry and  
19   analytical methods were competent enough to  
20   accomplish that. And they were in 1974, two years  
21   before Sean Marsee started using snuff.

22           I submit to you, ladies and gentlemen of the  
23   jury, it is absolutely unforgivable for United States  
24   Tobacco Company to put warnings on snuff products  
25   sold in Sweden so that Swedish mothers can have the



1 benefit of that, so people that are in the school  
2 systems can have the benefit of that, and for that  
3 same company to fail to give mothers and fathers and  
4 parents and teachers and coaches and everybody else  
5 in this country the benefit of the same warnings,  
6 unforgivable. It is so unforgivable that it warrants  
7 the sort of thing that my law partner wrote on the  
8 board over there.

9 I want to talk about the tobacco company's  
10 witnesses for a few moments. I keep thinking I ought  
11 to turn to my notes, but I want to do this. They  
12 didn't tell Doctor Shafer about the nitrosamines in  
13 snuff, in particular, nitrosomorpholine. They didn't  
14 tell Doctor Ackerman about the nitrosomorpholine in  
15 snuff. They didn't tell Doctor Helfrick, the oral  
16 surgeon from Houston who abhorred snuff, about the  
17 nitrosomorpholine in snuff that was causing cancer of  
18 the tongue. He was completely, completely unaware of  
19 that when he got on the witness stand.

20 They didn't tell Doctor Hansen from  
21 California about the nitrosomorpholine in their snuff  
22 before they put him on the witness stand. They  
23 didn't tell Doctor Rohrer about the nitrosomorpholine  
24 in snuff before they put him on the witness stand.

25 And, by the way, Doctor Rohrer, when I first

1 talked with him and Dania first talked with him,  
2 didn't say what Mr. Jennings said. He said this  
3 would be a difficult case to prove because it was not  
4 a typical snuff dipper's case. And it's not.

5 It involves the tongue, but the smoking gun  
6 in the hand is standing there over the body of the  
7 victim, and the smoking gun is the nitrosomorpholine  
8 and it is in the hand of the tobacco company and they  
9 have promoted it to innocent young people.

10 Oh, I'm sure they intended to catch the  
11 people that were age 20 to, you know, up in age, and,  
12 yes, there is some difficulty in cutting off your  
13 marketing to keep it from going to young people, but  
14 we don't have to guess at what they intended to do.  
15 They have told us what they intended to do. They put  
16 it in their documents, Chairman of the Board Louis  
17 Bantle, we dug through 800,000 pages of documents to  
18 find some of these documents to present to you. I  
19 have got people sitting out there whose fingers are  
20 nearly raw from having dug through documents from the  
21 files of the United States Tobacco Company. But we  
22 came up with some of those key documents, and one of  
23 those key documents you saw when Chairman Bantle  
24 testified, that said in 1968, "We're out to put snuff  
25 into the mouths of young people. We're out to create

1 a fad in 1968."

2 And in 1972 they followed that up and they  
3 told us expressly what they were out to do. They  
4 started to create a Lotus Project. This was a new  
5 project for new users, and we know who their target  
6 audience was. It was new users, mainly cigarette  
7 smokers. What was their age? Started at age 15. Is  
8 that consistent with what Walt Garrison told you? I  
9 don't think it is. I'm not sure Walt knew. I think  
10 he probably did. But you know they kept Walt in the  
11 dark for a long time, too. They didn't tell him  
12 about the problems with nitrosamines for a very long  
13 time after they already knew. And to that extent  
14 Walt Garrison is just as much a victim of that  
15 failure to warn as Sean Marsee was.

16 Going back to the tobacco company's  
17 witnesses. Their witnesses consisted of one  
18 pathologist, five dentists, most of which had a  
19 master's degree in oral pathology or oral surgery.  
20 There weren't any of them, to my knowledge, who have  
21 a Ph.D. in either of those specialties. Doctor  
22 Binnie astounded me. He was the one that got  
23 recruited by Ms. Janet McClendon, one of the lawyers  
24 that works for Mr. Finnegan, at a meeting in  
25 Amsterdam, and he immediately came over to the

1 tobacco company's side and got there on the witness  
2 stand and then was so profoundly embarrassed when I  
3 started reading him his own article that he had  
4 written two years ago or three years ago before he  
5 switched sides and went to the tobacco company. And  
6 his article flatly laid the blame of oral cancer on  
7 the use of tobacco, including snuff.

8 I don't call those independent witnesses  
9 when you see that sort of thing happening. And he  
10 was profoundly embarrassed, and I submit to you that  
11 that man deserved to be profoundly embarrassed.

12 Doctor Byers is another question. I believe  
13 Doctor Byers is probably a competent general  
14 surgeon. He's got a board certification in general  
15 surgery. He works at a good hospital in Houston,  
16 Texas. He didn't know about nitrosomorpholine,  
17 either. He didn't know about the nitrosomorpholine  
18 in the bubble gum, and if somebody had filed a suit  
19 claiming bubble gum caused cancer of the tongue, he  
20 would probably come and testify against the  
21 manufacturer of the bubble gum, because he didn't  
22 know there was nitrosomorpholine in the bubble gum  
23 that was causing tongue cancer, and I wouldn't have  
24 blamed him. And he may have felt the same way about  
25 snuff, because the tobacco company didn't tell him.

1 They knew about it, they had taken Doctor Lijinsky's  
2 deposition long before the trial started. They could  
3 have told him. And if they had, he would probably  
4 have had the same reaction I think that you will have  
5 when you think about the bubble gum example.

6 Talk about the rest of the tobacco company's  
7 witnesses. Let's see, we have Dr. Ackerman.  
8 Doctor Ackerman wrote a good article in 1948. He  
9 said that none of his verrucous carcinoma patients,  
10 they were all chewing tobacco and users, and we know  
11 chewing tobacco has got a lot smaller level of  
12 nitrosamines in it than snuff does. He said that  
13 they didn't get the garden variety squamous cell  
14 carcinoma, that they got exfoliating, but we know  
15 these things come in all varieties of oral cancer.

16 And then we have Doctor Kent Westbrook.  
17 Doctor Westbrook is the only head and neck surgeon  
18 that has testified that has ever personally done an  
19 epidemiological study on snuff dipper's cancer, the  
20 only one that has come to this courthouse with those  
21 kinds of qualifications, both in the field of  
22 epidemiology and in the field of surgery. But his  
23 study showed that of the 55 women snuff dippers in  
24 his study 51 or -2, or something like that of them,  
25 55 cheek and gum cancer case, 51 or -2 of them were

1 snuff dippers, virtually none of the controls, one or  
2 two out of the 55 controls. Yet when he looked at  
3 the kind of cancers they were, they came in two  
4 different kinds. They came in the outgrowing kind,  
5 but even those were not the classic Ackerman  
6 verrucous carcinoma.

7           When you looked at them under the  
8 microscope, they were standard squamous cell  
9 carcinomas. But about 28 percent of his were the  
10 ulcerating kind of squamous cell carcinoma,  
11 moderately well-differentiated, just exactly like the  
12 ulcerated squamous cell carcinoma that Sean Marsee  
13 had on his tongue. That sort of thing (indicating).  
14 A raw ulcer. It is not growing out like a wart. It  
15 is just a raw ulcerative squamous cell carcinoma of  
16 the tongue. And that's what Doctor Westbrook found  
17 in 28 percent of his patients. That's what Tony  
18 Axell found in 6 or 7 out of his 22 patients, was an  
19 ulcerating Grade 2 squamous cell carcinoma. Mr.  
20 Jennings didn't tell you about that or he forgot to  
21 mention it.

22           That takes us through Doctor Ackerman. We  
23 got through the oral surgeons. Doctor Hansen from  
24 California didn't know about nitrosomorpholine in  
25 snuff, didn't know anything about nitrosamines in

1 snuff, really not very much. He didn't know that  
2 they metastasized, that these cancers metastasized,  
3 because the oral cancers are limited to such a small  
4 area that he never looks at the cervical lymph nodes  
5 under the microscope to see.

6 That leaves, I think, besides the oral  
7 pathologist, they didn't tell Doctor Rohrer about  
8 nitrosomorpholine, either. You know, Doctor Rohrer  
9 has written a fine article. He said the study that  
10 the tobacco company wants you to disregard, this Winn  
11 Study right here, there's a copy of it in evidence,  
12 which is a xerox copy, that he didn't tell you that  
13 this was not a good study like the tobacco company is  
14 trying to tell you today. Doctor Rohrer said it was  
15 an excellent study in the article that he wrote in  
16 1982 and published in 1982. Said it was an excellent  
17 study. He also in that testimony or in that article  
18 said that 86.6 percent of the tongue cancer cases in  
19 India occurred in chewing, in users of chewing  
20 tobacco. He said a lot of other things about snuff,  
21 but he didn't know that nitrosomorpholine was in  
22 snuff. He didn't know when I talked with him a year  
23 ago, he didn't know until when he came to this trial.  
24 He didn't know because I didn't know it until about  
25 six or eight months ago. I had a pretty good idea it

1 was there, but I didn't know it. I didn't know it  
2 was in Copenhagen Snuff, in particular. I knew it  
3 was in some snuffs, but I didn't know that it was in  
4 Copenhagen Snuff in particular. You know what I had  
5 to do to find out? Remember Doctor Hecht and Doctor  
6 Hoffmann? I don't have it with me here. Remember  
7 the chart where Doctor Hecht and Doctor Hoffmann put  
8 up the labels? I had to go to New York City and take  
9 their depositions. They were the only witnesses in  
10 the country that had that information as to which  
11 brand of snuff had how much in the way of  
12 nitrosamines.

13 Ladies and gentlemen, Doctor Arthur Furst,  
14 he's a man that used a double standard. He used one  
15 standard when he testified in front of the IARC, said  
16 that you could prove cancer in humans from  
17 epidemiological studies even if all the animal  
18 studies were negative. And they came on the witness  
19 stand and said, "No, you can't. You have got to have  
20 perfect animal and perfect epidemiological studies."  
21 He used a standard, he used one standard when he was  
22 testifying for the tobacco company and another  
23 standard when he was talking to his peers. I suggest  
24 that gives you a perfect right to disregard  
25 absolutely everything that the man said and



1 speculated about. All animal studies that have been  
2 done with snuff itself showed on that chart we  
3 constructed in front of you, you couldn't get enough  
4 snuff in the mouths of animals, give a sufficient  
5 dose of nitrosamines to cause cancer. That's why the  
6 animal studies have not shown anything. But if you  
7 give nitrosamines to the animals in doses that  
8 approximate what people get, then they do get cancer,  
9 and they get cancer of the tongue, they get cancer of  
10 the oral cavity. You paint them with NNN and NNK  
11 inside their mouths, they get tumors all over the  
12 insides of their mouths.

13 Ladies and gentlemen of the jury, we have  
14 tried to bring you the finest people we could find.  
15 We brought Doctor Lester Breslow. He's past  
16 president of the International Association of  
17 Epidemiologists, but more importantly than that, he's  
18 a medical doctor and epidemiologist and he is still  
19 presently a director, not a mere staff surgeon like  
20 Doctor Byers, but a director of a major regional  
21 comprehensive cancer care and prevention center at  
22 UCLA called the Johnsson Cancer Care and Prevention  
23 Center. It is just as famous in that part of the  
24 world as M. D. Anderson is in Texas. He is not a  
25 staff surgeon, he's a director of that institution

1 and a world famous epidemiologist, and he says snuff  
2 causes cancer.

3 Doctor William Lijinsky is one of the three  
4 or four or five leading experts in the world on  
5 nitrosamines, probably the leading one in the United  
6 States. Doctor Hecht and Hoffmann are clearly the  
7 world's leading experts on nitrosamines found in  
8 tobacco. These are the biochemists that do the  
9 chemical carcinogenesis work. They know more about  
10 this than the doctors do, because they are in there  
11 in the laboratory doing the experiments, and the  
12 doctors are the ones that read their papers. And we  
13 brought them to you. We brought every one of them to  
14 you that we could. I think we brought you the finest  
15 witnesses on that subject that are available anywhere  
16 in the world, and they knew about nitrosamines in  
17 snuff.

18 Ladies and gentlemen of the jury, you heard  
19 Doctor Lijinsky tell you that there is no other  
20 consumer product sold and designed to go into the  
21 mouths of human beings that has levels of potent  
22 chemical carcinogens anywhere close to those that you  
23 see here, except for snuff.

24 We don't want your sympathy in this case.  
25 We want your hard and cold logic. This tobacco

1 company was selling a dangerous product that had  
2 extremely high levels of carcinogens and that one of  
3 those caused Sean Marsee's tongue cancer. We want  
4 your cold applied logic to all of that. There is no  
5 way you can bring Sean Marsee back, but you can send  
6 a message to the tobacco company that will be heard  
7 from here all the way to Greenwich, Connecticut.

8 Ladies and gentlemen, in the tobacco  
9 company's files I found a document I want to close  
10 with. It is in evidence. I am not sure which page  
11 it is, I am not even sure precisely what the exhibit  
12 number is, but in that document -- it is a marketing  
13 research document -- it says, "The image of the  
14 product -- " and it talks about perceptions of  
15 "product strength" is a common criteria for  
16 classifying typical users of different brands.  
17 "Hawken, Kodiak, and Silver Creek were frequently  
18 seen for "beginners...young men," and Copenhagen is  
19 universally regarded as the end of the line for  
20 experienced dippers.

21 Ladies and gentlemen, this is a marketing  
22 document. It is the kind of results of marketing  
23 research that the tobacco company relies upon  
24 statistics for all the time. When there is an 80  
25 percent confidence interval, they are tickled pink

1 for marketing data where it's a 95 percent confidence  
2 level like in the Deborah Winn study, they so no, no,  
3 no, that is statistics you can't rely on it. I wish  
4 they would have.

5 Ladies and gentlemen, the tobacco company  
6 admitted that Copenhagen was universally regarded as  
7 the end of the line for experienced dippers, and for  
8 Sean Marsee Copenhagen was the end of the line.

9 I thank you. You have been attentive. It  
10 has been a very long trial. I trust that justice  
11 will be done.

12 Thank you again.

13 Your Honor.

14 THE COURT: Ladies and gentlemen of the  
15 jury, we are going to recess for lunch now. We will  
16 recess until 1:30. You are obviously at a  
17 particularly sensitive point in the trial. You are  
18 about to hear the closing instructions of the Court,  
19 about to earnestly begin your deliberations, so I  
20 can't advise you strongly enough, over the lunch hour  
21 don't discuss the case, don't let anyone discuss the  
22 case around you. It obviously would be easy for  
23 someone at a restaurant table near you to be talking  
24 about a case and, if so, you either need to leave or  
25 admonish them that you are a juror. But just be very

1 careful not to discuss the case or let anyone discuss  
2 the case around you.

3 We will reconvene at 1:30, and everyone  
4 remain seated while the jury exits until 1:30.

5 (The following proceedings were had OUT OF THE  
6 PRESENCE AND HEARING OF THE JURY.)

7 THE COURT: Ladies and gentlemen, at 1:30  
8 the Court will give instructions to the jury, and  
9 during that period of time we don't allow anyone to  
10 come and go, so if you want to hear the instructions,  
11 that's fine. They are not particularly lengthy, but  
12 plan, if you come in to listen, that you stay during  
13 the course of the instructions. We won't allow  
14 anybody to come back in or to leave during those  
15 instructions.

16 Court will be in recess until 1:30.

17 (The noon recess was had.)

18 AFTERNOON SESSION

19 Thursday, June 19, 1986

20 (The Instructions were here read by the Court.)

21 THE COURT: Will counsel come forward,  
22 please.

23 (The following proceedings were had AT THE SIDE BAR.)

24 THE COURT: Any objections, additions or  
25 substitutions to the instructions? For the

1 plaintiff?

2 MR. BRALY: We object to the form of the  
3 instructions given on defect and would suggest that  
4 the form of the instruction that we submitted in  
5 writing or the form of the instruction as the Court  
6 had it prepared yesterday, day before, be given to  
7 the jury.

8 I am not sure which number it is, but that's  
9 the instruction --

10 THE COURT: You are talking about defect?

11 MR. BRALY: Yes.

12 THE COURT: I know which you mean.

13 THE CLERK: Defect or warning?

14 MR. BRALY: Both.

15 Now, I need to see the warning. That is, in  
16 addition, we would request the warning instruction  
17 that we filed and submitted or the warning  
18 instruction that the Court had prepared yesterday or  
19 did day before yesterday at the first instruction  
20 conference.

21 THE COURT: Anything else?

22 MR. BRALY: No, I don't have anything else.

23 THE COURT: All right. In regard to the  
24 warning instructions, I know there were several  
25 suggestions and alternatives, but I am satisfied that

1 the instruction I have given correctly states the law  
2 as it presently exists in Oklahoma, and I am  
3 satisfied and overrule your objection.

4 The defendants, any objections or  
5 substitutions or additions?

6 MR. FINNEGAN: Yes, Your Honor. We object  
7 to the instruction dealing with direct cause because  
8 it includes a reference to scientific and medical  
9 certainty and tells them that they do not have to  
10 find to a scientific and medical certainty, and we  
11 believe that the instructions should tell them what  
12 they should find to not tell them that they don't  
13 have to find to a scientific and medical certainty.

14 THE COURT: Again, as previously, I think  
15 that correctly states the law and your objection will  
16 be overruled.

17 MR. FINNEGAN: We also object to the  
18 instruction with regard to the duty to warn because  
19 we believe that the instruction should hold the  
20 defendant to a standard of a prudent manufacturer,  
21 not to the -- what is expected by the consumer.

22 THE COURT: All right. As stated to the  
23 plaintiff, I am satisfied that this instruction  
24 adequately reflects the law, as I read it.

25 MR. FINNEGAN: We further object to the

1 instruction on the rebuttable presumption as it  
2 relates to the efficacy of the warning. Our position  
3 is that no instruction should be given in a situation  
4 of this type because there has been evidence and an  
5 instruction of rebuttal of presumption should only be  
6 given when there is no evidence.

7 THE COURT: Well, I gave that instruction on  
8 rebuttable presumption, because I am not certain  
9 there has been evidence. There may be evidence that  
10 the jury would interpret in that respect, but I think  
11 it's -- if they don't interpret it in that respect,  
12 they are not going to know what the presumption is,  
13 so the objection will be overruled.

14 MR. FINNEGAN: And lastly, we object to the  
15 instruction dealing with punitive damages, because we  
16 believe that the length of this instruction gives  
17 undue evidence to punitive damages and we believe the  
18 proper instruction is the Oklahoma uniform  
19 instruction.

20 THE COURT: I will say it was longer than  
21 you might have expected, but I think the additions  
22 were helpful to the defendant as opposed to harmful.  
23 That objection will be overruled, also.

24 MR. FINNEGAN: Thank you, Your Honor.

25 THE COURT: Have both of you examined the



1 verdict form?

2 MR. FINNEGAN: We had earlier.

3 (Handed to counsel).

4 MR. BRALY: The only objection is the line  
5 isn't long enough, Judge.

6 (Handed to counsel).

7 MR. FINNEGAN: Fine with us.

8 THE COURT: Let the record reflect there is  
9 no objection to the verdict form. Thank you, ladies  
10 and gentlemen.

11 MR. BRALY: Thank you, Judge.

12 ( The following proceedings were had IN OPEN COURT.)

13 THE COURT: Let me ask if the six regular  
14 members of the jury can continue and deliberate in  
15 this cause? Any reason why the six regular members  
16 cannot continue and deliberate at this time?

17 There was some indication I received that  
18 one juror might be feeling a bit ill. Is that one of  
19 the regular jurors? All right. So with that  
20 assurance, the -- I am not sure who is ill --

21 THIRD ALTERNATE JUROR: I'm feeling ill  
22 today.

23 THE COURT: But the six regular members by  
24 their silence assured me that they could continue and  
25 deliberate. So if the bailiff would come forward and

1 be sworn.

2 (The bailiff was here duly sworn by the clerk.)

3 THE COURT: Ladies and gentlemen, I am  
4 sending now with the bailiff and he will have the  
5 verdict form and the instructions and you will begin  
6 your deliberations.

7 (At 2:25 p.m., the jury retired to commence their  
8 deliberations.)

9 (The following proceedings were had OUT OF THE  
10 PRESENCE AND HEARING OF THE JURY.)

11 THE COURT: Now, ladies, as you were advised  
12 when we commenced this case some five weeks ago, you  
13 were alternates, selected as alternates in the case,  
14 and you were selected in case for some reason one of  
15 the regular members of the jury couldn't continue in  
16 the case, you would take that person's place.  
17 Fortunately, thus far, they have all been able to  
18 continue. That possibility still exists, if for some  
19 reason during the deliberation one of them became ill  
20 or just couldn't continue for whatever reason, there  
21 is a possibility we might have to replace that juror  
22 with one of you. So I am going to excuse you to go  
23 home now; however, I am going to continue with you  
24 the admonition not to discuss the case and not to  
25 listen to anything about the case, don't do anything

1 in regard to the case, don't let anyone discuss the  
2 case around you or read anything about the case,  
3 because there is a possibility you may be recalled.  
4 I think it's not likely, but it's a possibility. I  
5 frankly have never done this before, kept alternates  
6 available, but this has been a long trial and it  
7 would be too bad if for some reason one of those  
8 persons couldn't continue and deliberate, because it  
9 is necessary that six persons decide a case.

10 So you remain under my admonitions to you.  
11 Once a verdict is rendered, you are obviously at that  
12 time free to discuss the case or read about the case  
13 or listen about the case and voice your opinions  
14 about the case, but until that time, until you hear  
15 about it or read about the fact that a verdict has  
16 been rendered, please continue with my admonitions to  
17 you.

18 Assuming nothing happens between now and the  
19 time a verdict is reached, I want to express my  
20 appreciation to you for your service over the last  
21 five weeks. I think this has been an unusually  
22 attentive jury over such a lengthy period of time. I  
23 have never seen your attention wander at all, and I  
24 think in behalf of all the parties, the plaintiffs  
25 and defendants and myself, we certainly appreciate it

1 and if I don't see you again in connection with this  
2 case, I hope to have you back as a juror in my  
3 courtroom.

4 You are excused.

5 Everyone remain seated while the jury exits.

6 Oh, if you would, before you leave, be sure  
7 and give her your phone number just in case she could  
8 contact you. Thank you very much, ladies.

9 Counsel, I believe you have advised Nancy of  
10 where you can be located and if you would, just be  
11 available in case there are any questions from the  
12 jury or we have a verdict from the jury. Otherwise,  
13 we will be in recess awaiting a verdict.

14 Court will be in recess.

15 MR. BRALY: Thank you, Your Honor.

16 I do anticipate, by the way, that for a  
17 verdict we will reconvene in my courtroom. I don't  
18 think it will be necessary to come back in here.

19 MR. BRALY: Do you want us to move all these  
20 exhibits over?

21 THE COURT: Let's king's X on that. We will  
22 use this courtroom until further notice.

23

24

25